EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

RECEIVED
SEP 18 1985
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 85-5404

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

TERRY B. ALLEN, Petitioner

-vs-

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE

ILLINOIS SUPREME COURT

ROBERT AGOSTINELLI
Deputy Defender

PETER A. CARUSONA*
Assistant Defender

Office of the State Appellate
Defender
628 Columbus Street - Suite 308
Ottawa, Illinois 61350
(815) 434-5531

COUNSEL FOR PETITIONER

VERLIN R. F. MEINZ
Assistant Defender
Office of the State
Appellate Defender
628 Columbus - Suite 308
Ottawa, Illinois 61350
(815) 434-5531

JEAN HERIGODT
Assistant Public Defender
6107 N. Sauganash
First Floor
Chicago, Illinois 60646
(312) 545-2953

OF COUNSEL

*COUNSEL OF RECORD

QUESTIONS PRESENTED FOR REVIEW

1) Does the Fifth Amendment privilege against self-incrimination apply to proceedings under the Illinois Sexually Dangerous Persons Act, an act which provides for the indefinite incarceration of persons found to be sexually dangerous?

2) May Illinois compel a defendant in a sexually dangerous person proceeding to answer incriminatory questions and use the defendant's admissions as a basis for committing him to the Department of Corrections for an indeterminate period of time?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW. i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES. iii

PRAYER. 1

OPINION BELOW 1

JURISDICTION. 2

CONSTITUTIONAL PROVISIONS INVOLVED. 2

STATUTES INVOLVED . . . . . 2; Appendix B

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

THIS COURT SHOULD GRANT THIS WRIT TO CONSIDER AS A MATTER OF FIRST IMPRESSION THE IMPORTANT AND UNJUST HOLDING OF THE ILLINOIS SUPREME COURT THAT THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION DOES NOT APPLY TO A SEXUALLY DANGEROUS PERSON PROCEEDING. THE COURT'S HOLDING OFFENDS THE PURPOSE OF THE FIFTH AMENDMENT PRIVILEGE; IT COMPELS DEFENDANTS CHARGED TO BE SEXUALLY DANGEROUS TO ANSWER INCRIMINATORY QUESTIONS AND PERMITS THEIR ANSWERS TO BE USED AS A BASIS FOR COMMITTING THEM TO THE DEPARTMENT OF CORRECTIONS FOR AN INDETERMINATE PERIOD OF TIME. . . . 5

CONCLUSION. 11

Appendix A -- Opinion of Illinois Supreme Court in People v. Allen, ___ Ill. 2d ___, ___ N.E.2d ___ (No. 60184, July 17, 1985)

Appendix B -- Sexually Dangerous Persons Act, Article 105 of the Illinois Code of Criminal Procedure, Ill. Rev. Stat. 1981, ch. 38, §105-1.01 et seq.

TABLE OF AUTHORITIES

Page

Cases

Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981) 8

In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). 6,8,9

Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)11 11

People v. Parrott, 108 Ill. App. 3d 222, 438 N.E.2d 1313 (3d Dist. 1982). 7

People v. Pembrock, 62 Ill. 2d 317, 342 N.E.2d 28 (1976). 7

Specht v. Patterson, 386 U.S. 605, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967) 9

United States ex rel. Stauchulak v. Coughlin, 520 F.2d 931 (7th Cir. 1975) 8

Statutes

Ill. Rev. Stat. 1981, ch. 38, §105-9. 7

Ill. Rev. Stat. 1981, ch. 38, §105-5. 10

Ill. Rev. Stat. 1981, ch. 38, §105-1.01 6,10

Other

Directory of Juvenile and Adult Correctional Agencies, at Ill. 115 (American Correctional Association 1984). . 7

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

TERRY B. ALLEN, Petitioner

-vs-

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE

ILLINOIS SUPREME COURT

PRAYER

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

May It Please the Court:

The petitioner, Terry B. Allen, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Supreme Court.

OPINION BELOW

The opinion of the Illinois Supreme Court, People v. Allen, ___ Ill. 2d ___, ___ N.E.2d ___ (No. 60184, July 17, 1985) has not been published yet in the reporters. A slip opinion appears at Appendix A.

JURISDICTION

The opinion of the Illinois Supreme Court affirming Petitioner's commitment was entered on July 17, 1985. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3). This petition is filed within 60 days of the opinion of the Illinois Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Sexually Dangerous Persons Act, Article 105 of the Illinois Code of Criminal Procedure, Ill. Rev. Stat. 1981, ch. 38, §105-1.01 et seq.). (See Appendix B).

STATEMENT OF THE CASE

Terry B. Allen was committed to the Department of Corrections as a sexually dangerous person for an indeterminate period of time. Proof of his status as a sexually dangerous person was based upon statements and admissions he made to two psychiatrists in separate compulsory examinations. Mr. Allen maintained in the trial court and on appeal that the use of his compulsory statements violated his Fifth Amendment privilege against self-incrimination (R87, 260; See Slip op. at 2). The Illinois Supreme Court, however, held that "there is no privilege against self-incrimination in sexually dangerous person proceedings" and that "defendants must answer all questions at such examinations regardless of the possible incriminatory nature of the answers." (Slip op. at 7-8).

The instant case was initiated as a criminal prosecution. Mr. Allen was charged by information with unlawful restraint and deviate sexual assault. Based on these charges, the State then filed a petition to have petitioner declared a sexually dangerous person under Article 105 of the Code of Criminal Procedure (Ill. Rev. Stat. 1981, ch. 38, §105) (See Appendix B). That petition required proof of: (1) the existence of a mental disorder for more than one year; (2) the existence of criminal propensities to the commission of sex offenses; and (3) the existence of demonstrated propensities towards acts of sexual assault (Ill. Rev. Stat. 1981, ch. 38, §105-1.01; Slip op. at 8). While the petition was pending, a preliminary hearing on charges in the information was held and the charges were dismissed for lack of probable cause. Defendant was then indicted and the petition was reinstated. The court ordered defendant, who was in custody, to submit to two psychiatric examinations (Slip op. at 1-2).

Mr. Allen was tried before the court on the petition, having previously waived his right to a jury determination of his

status. The two psychiatrists who conducted the court-compelled psychiatric examinations and the victim of the alleged assault were the only witnesses to testify. Both doctors opined that defendant was suffering from a mental disorder and had criminal propensities towards committing sexual assaults. Their opinions were based almost entirely upon defendant's statements and admissions made during the interviews about his sexual misconduct and the pending criminal charges (Slip op. at 2). (The defendant has no criminal record of any sex offense.)

The alleged victim of the assault was Christine Ray. She testified that she conversed with defendant about 30 to 45 minutes at a McDonald's Restaurant where she had been working. After the conversation ended, Ray left in her automobile and noticed the defendant was in her back seat. The defendant asked her to take him to "a romantic place -- or else". Ray drove to an airport parking lot where the defendant lay on top of her and simulated intercourse, although both were fully clothed. After defendant removed his pants, Ray manipulated his penis manually, agreeing to satisfy defendant if he would let her leave. According to Ray, defendant then pushed her head down, forcing her to perform fellatio. Ray subsequently entered the parking terminal alone to pay the parking fee. She told the attendant that a man had forced her to go to the airport, but she made no other attempts to summon help. Ray returned to the car and gave defendant a ride to his friend's home (Slip op. at 3-4).

Based upon the testimony of the three State witnesses, the trial court found defendant to be a sexually dangerous person and committed him to the Department of Corrections for an indefinite period of time. Under Illinois law, Mr. Allen can obtain his release and discharge only if it is proven by a preponderance of the evidence that he is no longer sexually dangerous (Ill. Rev. Stat. 1981, ch. 38, §105-9) (See Appendix B).

On appeal before the Third District Appellate Court, defendant's commitment was reversed. The court reasoned that the admission of the psychiatrist's conclusions violated defendant's privilege against self-incrimination since they were based solely on defendant's compelled inculpatory statements. People v. Allen, 123 Ill. App. 3d 669, 463 N.E.2d 135 (3d Dist. 1984). The State, however, was allowed leave to appeal in the Illinois Supreme Court and defendant's commitment was reinstated. People v. Allen, ___ Ill. 2d ___, ___ N.E.2d ___ (1985). As initially noted above, the Illinois Supreme Court held that there is no privilege against self-incrimination in a sexually dangerous person proceeding.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT THIS WRIT TO CONSIDER AS A MATTER OF FIRST IMPRESSION THE IMPORTANT AND UNJUST HOLDING OF THE ILLINOIS SUPREME COURT THAT THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION DOES NOT APPLY TO A SEXUALLY DANGEROUS PERSON PROCEEDING. THE COURT'S HOLDING OFFENDS THE PURPOSE OF THE FIFTH AMENDMENT PRIVILEGE; IT COMPELS DEFENDANTS CHARGED TO BE SEXUALLY DANGEROUS TO ANSWER INCRIMINATORY QUESTIONS AND PERMITS THEIR ANSWERS TO BE USED AS A BASIS FOR COMMITTING THEM TO THE DEPARTMENT OF CORRECTIONS FOR AN INDETERMINATE PERIOD OF TIME.

Terry Allen was and remains committed to the Illinois Department of Corrections for an indeterminate period of time as a sexually dangerous person. His commitment was the direct result of statements and admissions he made while in custody during a court-compelled psychiatric examination about pending criminal charges and purported past sexual misconduct. In upholding his commitment, the Illinois Supreme Court held that "defendants must answer all questions at such examinations

regardless of the possible incriminatory nature of the answers" since "there is no privilege against self-incrimination in sexually dangerous person proceedings" (Slip op. at 7-8). Petitioner urges this Honorable Court to allow this Petition and review this case. The Fifth Amendment privilege against self-incrimination should be held to apply through the due process clause to a proceeding which results in a loss of liberty for an indeterminate period, i.e., until the defendant can prove that he is no longer sexually dangerous.

The Illinois Supreme Court reasoned that the privilege against self-incrimination does not apply because sexually dangerous person proceedings are civil in nature (Slip op. at 5-6). As this Court, however, explained in In re Gault, 387 U.S. 1, 49, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967),

> [T]he availability of the privilege against self-incrimination does not turn upon the type of the proceeding in which its protection is involved, but upon the nature of the statement and the exposure which it invites.

Since, as defendant will show, his compelled statements were used to prove he was a sexually dangerous person and resulted in the loss of his liberty, the privilege should be held to apply.

Mr. Allen was originally charged in a criminal prosecution with the crimes of deviate sexual assault and unlawful restraint. Based on these charges, the State then filed a Petition to have him declared a Sexually Dangerous Person. That Petition, as noted by the court below, required proof of: (1) the existence of a mental disorder for more than one year; (2) the existence of criminal propensities to the commission of sex offenses, and (3) the existence of demonstrated propensities towards acts of sexual assault (Ill. Rev. Stat. 1981, ch. 38, §105-1.01). (Slip op. at 8). Mr. Allen, who was in custody at the time, was then compelled to submit to two psychiatric examinations. Defendant complied with the court's order, and the admissions and

statements he made about the charged crimes and purported prior sexual misconduct were used to prove he was sexually dangerous. Based upon defendant's admissions, the doctors opined that Mr. Allen was suffering from a mental disorder, that he had criminal propensities to commission of sex offenses and that he had demonstrated propensities towards acts of sexual assault (Slip op. at 2; R130-131).

Defendant's compelled admissions were thus used against him to prove he was a sexually dangerous person. Moreover, the exposure of his compelled statements resulted in a drastic impairment of his liberty and reputation. A person found to be sexually dangerous is committed to the Department of Corrections for an indeterminate period and cannot obtain his freedom until he can prove by a preponderance of the evidence that he is no longer sexually dangerous. Ill. Rev. Stat. 1981, ch. 38, §105-9; People v. Parrott, 108 Ill. App. 3d 222, 438 N.E.2d 1313, 1315-1316 (3d Dist. 1982). Additionally, an adjudication of sexual dangerousness is damning. People v. Pembrock, 62 Ill. 2d 317, 342 N.E.2d 28, 29 (1976) (commitment as a sexually dangerous person involves a "drastic impairment of the liberty and reputation of an individual"). A person adjudged to be sexually dangerous in Illinois is routinely sent to the Menard Psychiatric Center, a maximum-security institution in southern Illinois. The Center, originally a part of the Menard Correctional Center built in 1878, was set aside as a separate facility in 1933. In addition to sexually dangerous persons, the Center houses residents referred from other correctional institutions for psychiatric treatment and long-term sex offenders who volunteer for placement at the Center. All of the residents of the Center are housed in single-occupancy, maximum-security cells. Directory of Juvenile and Adult Correctional Agencies, at Ill. 115 (American Correctional Association 1984).

In United States ex rel. Stauchulak v. Coughlin, 520 F.2d 931 (7th Cir. 1975), the court recognized that an adjudication under the Illinois Sexually Dangerous Persons Act involved a drastic impairment of liberty and reputation. In holding the federal constitution requires that the reasonable doubt standard apply to an Illinois sexually dangerous person proceeding, the court compared the Illinois proceeding to a juvenile delinquency proceeding as follows:

> Here, the loss of liberty is as great, if not greater, than the loss in [a juvenile proceeding]. The violator of the criminal law--be he an adult or juvenile--is imprisoned, if at all, in almost all cases for a definite term. The person found to be sexually dangerous, in stark contrast, is committed for an indeterminate period and is unable to attain his freedom until he can prove that he is no longer sexually dangerous. Likewise with respect to stigma an involuntary commitment for sexual dangerousness presents an a fortiori case: Unlike the delinquency proceedings ..., these actions are not confidential, and an adjudication of sexual dangerousness is certainly more damning than a finding of juvenile delinquency. 520 F.2d at 935-936.

The comparison between a juvenile proceeding and a sexually dangerous person proceeding is a valid one. In Gault, the Court held that the privilege against self-incrimination applies to a juvenile proceeding. 387 U.S. at 55. A similar conclusion is required here where the loss of liberty and reputation is even greater.

Moreover, the fact that "treatment" accompanies commitment of a sexually dangerous person is of no significance since the commitment is a deprivation of liberty. As the Court noted in Gault:

> [Commitment] is incarceration against one's will, whether it is called "criminal" or "civil". And our Constitution guarantees that no person shall be "compelled" to be a witness against himself when he is threatened with deprivation of his liberty...

387 U.S. at 50. See Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981) (privilege applies to compulsory psychiatric examinations utilized for the purpose of determining

punishment in a sentencing hearing); Specht v. Patterson, 386 U.S. 605, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967) (due process requires that the right to counsel, the right to a hearing and the right to confrontation apply to state proceeding for indeterminate commitment of convicted sex offenders).

The Supreme Court of Illinois also reasoned that the privilege against self-incrimination should not apply because other procedural safeguards, such as the right to a jury trial, the requirement of proof beyond a reasonable doubt, and the right to confront witnesses, rendered the proceeding reliable. The Court felt that the privilege was not primarily concerned with reliability of the proceedings, but is instead designed to check the power of the State over the individual.

The Illinois Court's reasoning, however, is faulty. As the Court in Gault noted, reliability is a concern of the privilege since "a person, especially one of defective mentality or peculiar temperament, may falsely acknowledge guilt." 387 U.S. at 44-45 (Citations omitted).[1] Moreover, the right to a jury, the requirement of proof beyond a reasonable doubt, and the right to confront witnesses are essentially meaningless if the State

---

[1]The Court also stated the following:

> The privilege against self-incrimination is, of course, related to the question of the safeguards necessary to assure that admissions or confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable expressions of the truth. The roots of the privilege are, however, far deeper. They tap the basic stream of religious and political principle because the privilege reflects the limits of the individual's attornment to the state and--in a philosophical sense--insists upon the equality of the individual and the state. In other words, the privilege has a broader and deeper thrust than the rule which prevents the use of confessions which are the product of coercion because coercion is thought to carry with it the danger of unreliability. One of its purposes is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction. 387 U.S. at 47.

can compel the accused to confess to state psychiatrists. Indeed the State, under a logical extension of the holding on this case, could call the defendant himself as a witness and compel him to confess on the witness stand, i.e., make admissions that he has criminal propensity to the commission of sex offenses and has demonstrated these propensities.

Finally, the Illinois Supreme Court reasoned that the State's interest in protecting the public from sexually dangerous persons would be almost totally thwarted by application of the self-incrimination privilege in sexually dangerous person proceedings. This reasoning, however, is faulty since the State can criminally prosecute anyone who demonstrates a propensity to commit sexual assaults. Moreover, prior convictions can be admitted in a sexually dangerous proceeding as substantive proof of an accused's propensities towards the commission of sex offenses. Ill. Rev. Stat. 1981, ch. 38, §105-5. Consequently, the public is protected, especially against repeat offenders. It must be emphasized, however, that Terry Allen has no record of a prior sex offense.

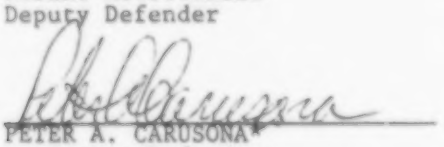
The holding in this case thus is not necessary to protect the public. Indeed the holding has a drastic consequence which threatens citizens: it creates an incentive for the prosecution to file a sexually dangerous person petition in cases where it feels it does not have sufficient evidence to convict for the original offense charged. By filing a petition, the State can force the defendant to be a witness against himself, causing the deprivation of his own liberty. This is precisely what occurred here since the criminal charges were originally dismissed against Terry Allen after probable cause could not be established at a preliminary hearing.

CONCLUSION

This Court should grant a Writ of Certiorari in this case to correct the erroneous and unjust holding by the Illinois Supreme Court. As noted by the Court in Malloy v. Hogan, 378 U.S. 1, 7, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964) "the American system of ... prosecution is accusatorial, not inquisitorial." The Illinois procedure which allows the indeterminate loss of liberty and stigmatization as a sexually dangerous person is wholly inquisitorial and offends the Fifth Amendment.

Respectfully submitted,

ROBERT AGOSTINELLI
Deputy Defender



PETER A. CARUSONA*
Assistant Defender

Office of the State Appellate Defender
628 Columbus Street - Suite 308
Ottawa, Illinois 61350
(815) 434-5531

COUNSEL FOR PETITIONER

VERLIN R. F. MEINZ
Assistant Defender
Office of the State Appellate Defender
628 Columbus - Suite 308
Ottawa, Illinois 61350
(815) 434-5531

JEAN HERIGODT
Assistant Public Defender
6107 N. Sauganash
First Floor
Chicago, Illinois 60646
(312) 545-2953

OF COUNSEL

*COUNSEL OF RECORD

APPENDIX A

Docket No. 60184—Agenda 4—March 1985.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. TERRY B. ALLEN, Appellee.

JUSTICE MORAN delivered the opinion of the court:

Defendant, Terry B. Allen, was charged by information in the circuit court of Peoria County with the crimes of unlawful restraint and deviate sexual assault. The State then filed a petition to have defendant declared a sexually dangerous person pursuant to article 105 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1981, ch. 38, par. 105—1.01 *et seq.*). While the sexually dangerous person petition (petition) was pending a preliminary hearing was held on the information, and the charges were dismissed for lack of probable cause. Defendant was then indicted and the petition reinstated.

Before trial on the indictment, a bench trial was held on the petition. The trial court found defendant to be a sexually dangerous person. After his post-trial motions were denied defendant appealed. The appellate court, with one dissent, reversed, holding that (1) the trial court had improperly relied upon testimony obtained in violation of defendant's privilege against self-incrimination, and (2) the State was required to prove multiple acts of sexual assault in order to show that defendant was a sexually dangerous person as defined in the statute. (123 Ill. App. 3d 669.) We granted the State's petition for leave to appeal.

On appeal the State raises three issues, but two of these issues present the identical question. They can therefore be condensed as follows: (1) Are *Miranda* warnings required before a defendant may be examined by a psychiatrist pursuant to a court order in a sexually dangerous person proceeding? and (2) Did the defendant waive any privilege against self-incrimination which he may have had? The defendant, on cross-appeal, raises a third issue: Did the State prove beyond a reasonable doubt that the defendant was a sexually dangerous person as defined by statute?

Defendant was formally charged with unlawful restraint and deviate sexual assault. The State then filed the sexually dangerous person petition. With the defendant and defense counsel both present, the court ordered defendant to submit

FILED

JUL 17 1985

CLERK SUPREME COURT
ILLINOIS

to two psychiatric examinations. No court reporter was present at this hearing, but the written order for the hearing states that the procedure and rights under the sexually dangerous persons statute were explained to the defendant and the defendant indicated that he understood the nature of the proceedings.

On March 4, 1983, the defendant was tried under the petition in a bench trial. The State presented three witnesses, but the defendant did not produce any evidence. The State's first witness was Dr. Bradford Colen, a psychiatrist who had interviewed defendant. Defendant objected to Dr. Colen's testimony, claiming that the doctor had elicited information from him in violation of his privilege against self-incrimination. Aside from some observations about the defendant's appearance and his apparent confusion and vagueness, Dr. Colen's testimony was based almost entirely upon defendant's statements and admissions made during the interview. The trial court ruled that defendant's statements to Dr. Colen were not admissible into evidence, but allowed the doctor to give an opinion based upon his overall interview with defendant. His opinion was that defendant was mentally ill with criminal propensities to commit sex crimes.

The State's next witness was Dr. Mortimer Beck, another psychiatrist, who had examined defendant. The trial judge again refused to allow into evidence the defendant's statements to the psychiatrist, but allowed Dr. Beck to express an opinion which was based "to a great extent" upon defendant's statements and admissions during his interview. Dr. Beck's opinion was that defendant was suffering from a mental disorder and had criminal propensities toward committing sexual assaults.

The State's final witness was Christine Ray, the victim of the alleged assault. Ray worked at a McDonald's restaurant in Peoria, and had noticed the defendant in the restaurant on October 11, 1982. She had spoken briefly to him while she was cleaning tables. After she got off work, at about 6 p.m., she sat down in a booth. Defendant came up and asked Ray if he could join her. She agreed, and the two talked for approximately 30 to 45 minutes. At some point in the conversation Ray described her automobile to defendant and mentioned the general location at which it was parked.

After ending the conversation Ray went into the restroom. When she emerged defendant was no longer in the restaurant. She went out to her automobile, where she dis-

covered that she had left one of the doors unlocked. She got in, started the car, and pulled out of the parking lot. When she stopped at the first stop sign she noticed that defendant was in the back seat of her car.

At this point, Ray testified, defendant asked her to take him to "a romantic place." She asked him where to go and he replied "a romantic place—or else." His tone of voice, she testified, was "kind of threatening type."

At defendant's request, Ray drove to the airport. After reaching the airport she drove around the parking area a few times until defendant told her to pull into the parking lot. She pulled up to the parking gate and opened the door to reach for the parking ticket. As she reached for the ticket defendant reached over and grabbed her on the neck or shoulder. He let go, however, and she got back in the car. Defendant then climbed over into the front seat.

Ray parked the car, and defendant asked her to lift the steering wheel and put the seat back. After doing so, Ray testified, defendant "grabbed me by the legs, set them up in the front seat." He then pulled her to a prone position and lay on top of her, simulating intercourse even though both were fully clothed.

Next, Ray testified, defendant took off his pants and asked her to take hers off also. She said no, whereupon "he reached for them, tugged them off a little bit. I finally decided to take them off." When asked by the prosecutor why she took off her pants Ray replied, "Due to the fact that he was going to get them off whatever way he wanted, anyhow."

Defendant again simulated intercourse, although Ray was still wearing panty-hose. After a short time he stopped, and asked Ray if she would perform fellatio on him. Ray said no, whereupon defendant insisted that she would. Ray asked if she could leave, to which defendant replied "after he was satisfied." Ray testified that she finally agreed to satisfy defendant if he would let her leave.

Ray then proceeded to manipulate defendant's penis manually. She testified that defendant pushed her head down, forcing her to perform fellatio. She tried to resist but, because of an injury sustained in football while in school, was unable to do so.

Ray then again asked defendant if she could leave, and he agreed. With defendant still in the car she drove to the parking lot gate. Both of them exited the car, and Ray locked the car and entered the terminal to pay the parking

fee. While in the terminal she told the woman who took her parking fee that a man had forced her to go to the airport, but Ray testified that she realized that the woman was not going to call airport security. She made no other attempt to summon help before returning to the car. She then gave defendant a ride to a trailer where he said a friend of his lived.

On redirect examination Ray testified that she had asked defendant several times if she could leave, and each time defendant told her that she could not leave until "he got what he wanted." She did, however, admit that her fear of defendant was based in part upon her experiences with another man:

> "I had a fiancee and he had a drinking problem, and you went along with him, or you might have been dead, and I learned that if you halfway go along with a person to a point, that chances are you will get out of it okay, but it was a fifty-fifty chance, and I was hoping that this guy was, at least, partially like the guy that I had had all my experience with."

In *People v. English* (1964), 31 Ill. 2d 301, this court held that sexually dangerous persons proceedings, while similar to criminal proceedings, were nonetheless essentially civil in nature. This was so even though the interests at stake mandated stricter procedural safeguards than in an ordinary civil proceeding:

> "Since the Sexually Dangerous Persons Act provides for involuntary confinement, although it be for the treatment of the defendant rather than punishment for a crime, it is natural that some of the same safeguards which are applicable in a criminal prosecution be applied to the proceedings under the act. This does not mean, however, that the commitment proceeding is a criminal prosecution or that criminal procedure as a whole must be followed in the proceeding." (31 Ill. 2d 301, 304.)

See also *People v. Studdard* (1972), 51 Ill. 2d 190, 196.

This aspect of *English* has not been affected by subsequent cases. Although the fact that incarceration may result is relevant to the question of whether or not the self-incrimination privilege applies (*In re Gault* (1967) 387 U.S. 1, 50, 18 L. Ed. 2d 527, 558-59, 87 S. Ct. 1428, 1455), it is clear that "the fact that a proceeding will result in loss of liberty does not *ipso facto* mean that the proceeding is a 'criminal prosecution'." (*Middendorf v. Henry* (1976), 425 U.S. 25, 37, 47 L. Ed. 2d 556, 566, 96 S. Ct. 1281, 1289.) In *Minnesota v.*

Murphy (1984), ___ U.S. ___, 79 L. Ed. 2d 409, 104 S. Ct. 1136, the Supreme Court applied the principle in *Middendorf* to the privilege against self-incrimination. After holding that the revocation of probation was not a criminal proceeding, the court then ruled that a defendant cannot claim the privilege merely because his answer to a question might result in revocation of his probationary status. (___ U.S. ___, ___ & n.7, 79 L. Ed. 2d 409, 424-25 & n.7, 104 S. Ct. 1136, 1146-47 & n.7.) However, a defendant may still refuse to answer questions if the answers could be used to implicate him in a separate criminal offense. ___ U.S. ___, ___ & n.7, 79 L. Ed. 2d 409, 424-25 & n.7, 104 S. Ct. 1136, 1146-47 & n.7.

The holding that sexually dangerous persons proceedings are not criminal prosecutions was also not altered by *People v. Pembrock* (1976), 62 Ill. 2d 317. In *Pembrock* this court ruled that because of the liberty interests at stake in a sexually dangerous person proceeding, due process required that the State prove the defendant's status beyond a reasonable doubt. (62 Ill. 2d 317, 321.) This holding has since been incorporated into the statute. (Ill. Rev. Stat. 1983, ch. 38, par. 105–3.01.) *English*, however, recognized that the liberty interest at stake in such a proceeding required strict procedural safeguards, but held that not all criminal procedural safeguards need be applied. (*People v. English* (1964), 31 Ill. 2d 301, 304.) *Pembrock*, which requires only one particular procedural safeguard, is not inconsistent with *English*.

We see no reason now to disturb that part of *English* which held that a sexually dangerous person proceeding is not a criminal prosecution. A person found to be sexually dangerous is to receive "care and treatment *** designed to effect recovery." (Ill. Rev. Stat. 1983, ch. 38, par. 105–8.) Upon recovery the defendant is released from custody and the information or indictment which led to his commitment is quashed. (Ill. Rev. Stat. 1983, ch. 38, par. 105–9.) Since treatment, not punishment, is the aim of the statute, the legislative determination that the proceedings are civil in nature (Ill. Rev. Stat. 1983, ch. 38, par. 105–3.01) is eminently reasonable. See *Addington v. Texas* (1979), 441 U.S. 418, 428, 60 L. Ed. 2d 323, 332, 99 S. Ct. 1804, 1810; *Tippett v. State of Maryland* (4th Cir. 1971), 436 F.2d 1153, 1159, *cert. dismissed sub nom. Murel v. Baltimore City Criminal Court* (1972), 407 U.S. 355, 32 L. Ed. 2d 791, 92 S. Ct. 2091; *French v. Blackburn* (M.D.N.C. 1977), 428 F. Supp. 1351, 1359 *aff'd* (1979), 443 U.S. 901, 61 L. Ed. 2d

869, 99 S. Ct. 3091; *Cramer v. Tyars* (1979), 23 Cal. 3d 131, 137-38, 588 P.2d 793, 796-97, 151 Cal. Rptr. 653, 656-57; *People v. Poggi* (1980), 107 Cal. App. 3d 581, 586, 165 Cal. Rptr. 758, 760; *In re Beverly* (Fla. 1977), 342 So. 2d 481, 488-89; *Commonwealth v. Barboza* (1982), 387 Mass. 105, ___, 438 N.E. 2d 1064, 1069, *cert. denied* (1982), 459 U.S. 1020, 74 L. Ed. 2d 516, 103 S. Ct. 385; *In re Matthews* (1980), 46 Or. App. 757, 762, 613 P.2d 88, 91, *cert. denied* (1981), 450 U.S. 1040, 68 L. Ed. 2d 237, 101 S. Ct. 1757; *Moss v. State* (Tex. Civ. App. 1976), 539 S.W.2d 936, 945-48.

The appellate court believed that *People v. Capoldi* (1957), 10 Ill. 2d 261, applied the privilege against self-incrimination to these proceedings. (123 Ill. App. 3d 669, 671.) This interpretation is erroneous, especially since *English*, decided after *Capoldi*, specifically held that the privilege did not apply. *Capoldi* held only that the State must make a preliminary showing as to the voluntariness of admissions sought to be introduced in a sexually dangerous person proceeding. (10 Ill. 2d 261, 268.) Voluntariness and the self-incrimination privilege are separate issues, however, and in this case the in-court warnings to defendant and the fact that he was represented by counsel convince us that the preliminary showing of voluntariness was indeed made. Had the defendant claimed that the statements to the psychiatrists were involuntary then *Capoldi* might entitle him to a preliminary hearing on the question (10 Ill. 2d 261, 267-68), but since defendant does not claim that the statements were involuntary then *English*, and not *Capoldi*, applies.

The holding that the privilege against self-incrimination is not required in the proceedings in question is supported by the subsequent ruling in *Mathews v. Eldridge* (1976), 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893. *Eldridge* set out the factors relevant to the evaluation of a procedural due process claim:

> "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. 319, 335, 47 L. Ed. 2d 18, 33, 96 S. Ct. 893, 903.

While the private interest involved in the instant proceeding is great, there are already numerous safeguards en-

suring reliability, including the right to a jury trial (Ill. Rev. Stat. 1983, ch. 38, par. 105—5), the requirement of proof beyond a reasonable doubt (Ill. Rev. Stat. 1983, ch. 38, par. 105—3.01), and the right to confront witnesses (*People v. Nastasio* (1960), 19 Ill. 2d 524). The privilege against self-incrimination would add little more reliability to the proceedings, especially since the privilege is not primarily concerned with reliability but is instead designed to check the power of the State over the individual. *In re Gault* (1967), 387 U.S. 1, 47, 18 L. Ed. 2d 527, 557, 87 S. Ct. 1428, 1454.

Finally, the State has a substantial interest in treating as well as protecting the public from sexually dangerous persons, an interest which would be almost totally thwarted by a strict application of the self-incrimination privilege in such proceedings. If a defendant is allowed to refuse to answer questions asked during the psychiatric interview then it would be nearly impossible for the State to determine whether or not the defendant was sexually dangerous. Since the self-incrimination privilege would be a great burden to the State while being of minimal value in assuring reliability, the *Eldridge* test totally supports the holding in *English* that due process does not require the application of the privilege.

Since there is no privilege against self-incrimination in sexually dangerous person proceedings there is no need for *Miranda* warnings to be given. At this stage no criminal proceeding is involved. Therefore the appellate court's reliance upon *Estelle v. Smith* (1981), 451 U.S. 454, 68 L. Ed. 2d 359, 101 S. Ct. 1866, is misplaced. In *Estelle v. Smith* the court held that *Miranda* warnings must be given when the defendant's statements to a court-appointed psychiatrist are used against him in the death penalty phase of a criminal prosecution. (451 U.S. 454, 468-69, 68 L. Ed. 2d 359, 372-73, 101 S. Ct. 1866, 1876.) However, if the use of such statements is confined to noncriminal proceedings, no *Miranda* issue arises. 451 U.S. 454, 465, 68 L. Ed. 2d 359, 370, 101 S. Ct. 1866, 1874.

While we agree with the holding in *English* that sexually dangerous persons proceedings are not criminal proceedings, we disagree with the *English* court insofar as it would allow a defendant to refuse to answer questions which may incriminate him. (*People v. English* (1964), 31 Ill. 2d 301, 307-08.) To allow even such a limited privilege would unduly frustrate the purposes of the sexually dangerous persons provisions by making it nearly impossible to identify sexually

dangerous persons. Moreover, such a privilege is not necessary to protect the defendant's fifth amendment rights. As *Estelle v. Smith* makes clear, courts may simply exclude the defendant's compelled testimony from use in subsequent criminal proceedings. (*Estelle v. Smith* (1981), 451 U.S. 454, 468-69, 68 L. Ed. 2d 359, 372-73, 101 S. Ct. 1866, 1876.) We therefore hold that a defendant's statements to a psychiatrist in a compulsory examination under the provisions here involved may not be used against him in any subsequent criminal proceedings. Consequently, defendants must answer all questions at such examinations regardless of the possible incriminatory nature of the answers.

Accordingly, the appellate court erred when it barred the use of testimony based upon defendant's statements to Dr. Colen and Dr. Beck. It would have been proper to allow into evidence both the statements themselves and the psychiatrists' conclusions based thereon.

We need not reach the issue of whether or not defendant waived his privilege against self-incrimination. Our holding that he did not have such a privilege in this type of proceeding makes a discussion of waiver unnecessary.

Defendant also argues, and the appellate court apparently agreed, that the statute here involved requires that the State demonstrate more than one actual act of sexual assault or sexual molestation. The State, on the other hand, claims that the statute requires only a showing of "propensity," and does not require that the State prove any actual crime. In our view, neither position is supported by the statutory language.

Section 1.01 of the Sexually Dangerous Persons Act defines sexually dangerous persons as follows:

> "All persons suffering from a mental disorder, which mental disorder has existed for a period of not less than one year, immediately prior to the filing of the petition hereinafter provided for, coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children, are hereby declared sexually dangerous persons." (Ill. Rev. Stat. 1983, ch. 38, par. 105—1.01.)

In *People v. Pembrock* (1976), 62 Ill. 2d 317, 321-22, the court construed this language as requiring proof of three separate elements:

> "(1) the existence of a mental disorder for more than one year; (2) the existence of criminal propensities to the

commission of sex offenses; and (3) the existence of demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children."

It is clear, therefore, that the statute requires more than the proof of mere "propensity"; it also requires that the State prove that the defendant has "demonstrated" this propensity. This language can only mean that the State must prove at least one act of or attempt at sexual assault or sexual molestation.

There is, however, nothing in the statute requiring the State to prove multiple sex crimes. One purpose of the statute is to prevent mentally ill persons from being held criminally responsible for crimes committed while mentally ill. (*People v. Studdard* (1972), 51 Ill. 2d 190, 196; *People v. Sims* (1943), 382 Ill. 472, 476.) It would be illogical to construe the statute to require that a defendant cannot be treated until he has committed more than one assault. Furthermore, the statute is primarily concerned with prediction of the defendant's future conduct; the requirement that the defendant must have "demonstrated" his propensities means only that the commitment order cannot be based *solely* on psychological speculation. We therefore hold that the plural language of the statute—"acts of sexual assault or acts of sexual molestation"—refers to the defendant's future propensities, not to the demonstrated conduct.

We must, however, address the further issue, raised on cross-appeal, of whether the evidence at trial establishes even one act of sexual assault. Therefore, the sole evidence of a sexual assault was Christine Ray's testimony. Sexual assault, at the time of the alleged crime, required a sexual act achieved by "force or threat of force." (Ill. Rev. Stat. 1983, ch. 38, par. 11—3, now repealed and replaced by Ill. Rev. Stat., 1984 Supp., ch. 38, par. 12—13, which contains a similar requirement.) Defendant claims that the evidence does not establish beyond a reasonable doubt that he used force upon Christine Ray, or threatened her with force. It is for the trier of fact, however, to determine the weight and sufficiency of the evidence, and the reviewing court should not substitute its judgment for the trier of fact unless the evidence is so improbable as to raise a reasonable doubt of guilt. (*People v. Molstad* (1984), 101 Ill. 2d 128, 133; *People v. Davis* (1983), 95 Ill. 2d 1, 27.) In this case we are convinced that there was sufficient evidence for the trial court to find that defendant forced Christine Ray to perform sexual acts.

First of all, defendant's unannounced appearance in Ms. Ray's automobile indicated potential hostility, as did his demand for her to drive to a "romantic place—or else." Defendant reached over and grabbed Ray at the parking lot gate when he thought she was trying to exit the car, an action which gave an ominous cast to his repeated insistence that she was not free to leave the car until he "got what he wanted." Under these circumstances the trial court could properly have found a threat of force, and there was no need for Ms. Ray to risk injury by testing out those threats. While Ray's experiences with her former boyfriend may have increased her fear of physical harm, there was adequate evidence for the trial court to find that defendant himself threatened her.

In conclusion, the appellate court erred in barring the use of testimony based upon defendant's statements to Dr. Colen and Dr. Beck, and also erred in ruling that the State must demonstrate more than one act of sexual assault. In addition, we are convinced that there was sufficient evidence to establish defendant's sexually dangerous status beyond a reasonable doubt. We therefore reverse the judgment of the appellate court and affirm the judgment of the circuit court. We remand this cause to the circuit court of Peoria County for further proceedings.

Appellate court reversed;
circuit court affirmed;
cause remanded.

APPENDIX B

Sexually Dangerous Persons Act, Article 105 of the Code of Criminal Procedure (Ill. Rev. Stat. 1981, ch. 38, §105-1.01 et seq.).

105-1.01. Sexually dangerous persons--Definition

§1.01. As used in this Act:

All persons suffering from a mental disorder, which mental disorder has existed for a period of not less than one year, immediately prior to the filing of the petition hereinafter provided for, coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children, are hereby declared sexually dangerous persons.

105-2. Jurisdiction

§2. Jurisdiction of proceedings under this Act is vested in the circuit courts in this State, for the purpose of conducting hearings for commitment and detention of such persons, as hereinafter provided.

105-3. Petition--Contents

§3. When any person is charged with a criminal offense and it shall appear to the Attorney General or to the State's Attorney of the county wherein such person is so charged, that such person is a sexually dangerous person, within the meaning of this Act, then the Attorney General or State's Attorney of such county may file with the clerk of the court in the same proceeding wherein such person stands charged with criminal offense, a petition in writing setting forth facts tending to show that the person named is a sexually dangerous person.

105-3.01. Civil nature of proceedings--Burden of proof--Procedure

§3.01. The proceedings under this Act shall be civil in nature, however, the burden of proof required to commit a defendant to confinement as a sexually dangerous person shall be the standard of proof required in a criminal proceedings of proof beyond a reasonable doubt. The provisions of the Civil Practice Act, and all existing and future amendments of that Act and modifications thereof and the Supreme Court Rules now or hereafter adopted in relation to that Act shall apply to all proceedings hereunder except as otherwise provided in this Act.

105-4. Examination by psychiatrist

§4. After the filing of the petition, the court shall appoint two qualified psychiatrists to make a personal examination of such alleged sexually dangerous person, to ascertain whether such person is sexually dangerous, and the psychiatrists shall file with the court a report in writing of the result of their examination, a copy of which shall be delivered to the respondent.

105-4.01. "Qualified psychiatrist"--Defined

§4.01. "Qualified psychiatrist" means a reputable physician licensed in Illinois to practice medicine in all its branches, who has specialized in the diagnosis and treatment of mental and nervous disorders for a period of not less than 5 years.

105-4.02. Psychiatric examination in counties less than 500,000--Costs

§4.02. In counties of less than 500,000 inhabitants the cost of the psychiatric examination required by Section 4 is a charge against and shall be paid out of the general fund of the county in which the proceeding is brought.

105-5. Jury trial, right to--Evidence

§5. The respondent in any proceedings under this Act shall have the right to demand a trial by jury and to be represented by counsel. At the hearing on the petition it shall be competent to introduce evidence of the commission by the respondent of any number of crimes together with whatever punishments, if any, were inflicted.

105-6. §6. Repealed by Laws 1955, p. 1144, eff. July 7, 1955.

105-7. Reserved.

105-8. Director of Corrections as guardian

§8. If the respondent is found to be a sexually dangerous person then the court shall appoint the Director of Corrections guardian of the person found to be sexually dangerous and such person shall stand committed to the custody of such guardian. The Director of Corrections as guardian shall keep safely the person so committed until the person has recovered and is released as hereinafter provided. The Director of Corrections as guardian shall provide care and treatment for the person committed to him designed to effect recovery. The Director may place that ward in any facility in the Department of Corrections or portion thereof set aside for the care and treatment of sexually dangerous persons. The Department of Corrections may also request another state Department or Agency to examine such patient and upon such request, such Department or Agency shall

also request another state Department or Agency to examine such patient and upon such request, such Department or Agency shall make such examination and the Department of Corrections may, with the consent of the chief executive officer of such other Department or Agency, thereupon place such patient in the care and treatment of such other Department or Agency.

105-9. Application showing recovery--Hearing--Discharge

§9. An application in writing setting forth facts showing that such sexually dangerous person or criminal sexual psychopathic person has recovered may be filed before the committing court. Upon receipt thereof, the clerk of the court shall cause a copy of the application to be sent to the Director of the Department of Corrections. The Director shall then cause to be prepared and sent to the court a socio-psychiatric report concerning the applicant. The report shall be prepared by the psychiatrist, sociologist, psychologist and warden of, or assigned to, the institution wherein such applicant is confined. The court shall set a date for the hearing upon such application and shall consider the report so prepared under the direction of the Director of the Department of Corrections and any other relevant information submitted by or on behalf of such applicant. If the patient is found to be no longer dangerous, the court shall order that he be discharged. If the court finds that the patient appears no longer to be dangerous but that it is impossible to determine with certainty under conditions of institutional care that such person has fully recovered, the court shall enter an order permitting such person to go at large subject to such conditions and such supervision by the Director as in the opinion of the court will adequately protect the public. In the event the person violates any of the conditions of such order, the court shall revoke such conditional release and recommit the person pursuant to Section 5-6-4 of the Unified Code of Corrections under the terms of the original commitment. Upon an order of discharge every outstanding information and indictment, the basis of which was the reason for the present detention, shall be quashed.

105-10. Conditional release--Petition--Revocation and re-commitment

§10. Whenever the Director finds that any person committed to him under this Act as now or hereafter amended, appears no longer to be dangerous but that it is impossible to determine with certainty under conditions of institutional care that such person has fully recovered, the Director of the Department of Corrections may petition the committing court for an order authorizing the conditional release of any person committed to him under this Act and the court may enter an order permitting such person to go at large subject to such conditions and such supervision by the Director as in the opinion of the court will

adequately protect the public. In the event the person violates any of the conditions of such order, the court shall revoke such conditional release and re-commit the person pursuant to Section 5-6-4 of the Unified Code of Corrections under the terms of the original commitment.

105-11. Partial invalidity

§11. If any provision of this Act, or the application of any provision to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

105-12. Custody transferred from Department of Public Safety to Director of Corrections

§12. Persons heretofore committed to the Department of Public Safety are deemed transferred and committed to the custody of the Director of Corrections.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

RECEIVED
OCT 7 1985
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 85-5404

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

Supreme Court, U.S.
FILED
OCT 7 1985
JOSEPH F. SPANIOL, JR.
CLERK

TERRY B. ALLEN,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari
To The
Illinois Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

NEIL F. HARTIGAN
Attorney General
State of Illinois

ROMA J. STEWART
Solicitor General
State of Illinois

MARK L. ROTERT

SALLY L. DILGART*
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 917-2570

Counsel for Respondent.

* Counsel of Record.

QUESTION PRESENTED FOR REVIEW

Are disclosures made to psychiatrists in a civil involuntary commitment proceeding protected by the fifth amendment privilege against compulsory self-incrimination.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	1
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT	2
REASONS FOR DENYING THE WRIT:	
I.	
THIS CASE PRESENTS AN UNSUITABLE OPPORTUNITY TO RE-EXAMINE WELL-ESTABLISHED DECISIONAL LAW	3
II.	
THE DECISION OF THE ILLINOIS COURT IS CONSISTENT WITH PUBLIC POLICY AND WELL-ESTABLISHED LAW	4
CONCLUSION	9

TABLE OF AUTHORITIES

Cases:	Page
Addington v. Texas, 441 U.S. 418 (1979)	6,7,8
Baxter v. Palmigiano, 425 U.S. 308 (1976)	7
Brown v. Walker, 161 U.S. 591 (1896)	5
California v. Byers, 402 U.S. 424 (1971)	8
Commonwealth v. Barbosa, 387 Mass. 105, 438 N.E.2d 1064, cert. denied, ___ U.S. ___, 103 S.Ct. 385 (1982)	8
Cramer v. Tyars, 151 Cal. Rptr. 653, 23 Cal. 3d 131, 588 P.2d 795 (1979) (en banc)	8
Estelle v. Smith, 451 U.S. 454 (1981)	4,5,7,8
French v. Blackburn, 428 F. Supp. 1351 (D. N.C.), aff'd without op. 443 U.S. 901 (1977)	7
Garner v. United States, 424 U.S. 648 (1976)	4
Ill. Rev. Stat. (1979) ch. 38 ¶ 105-1.01 et seq	3,5,6
In Re Beverly, 342 So.2d 481 (Fla. Sup. Ct. 1977)	8
In Re Gault, 387 U.S. 1 (1967)	7
In Re Winship, 397 U.S. 358 (1970)	6
In Re Winstead, 67 Oh. App. 2d 111, 425 N.E.2d 943 (1980)	7
McKeiver v. Pennsylvania, 403 U.S. 528 (1971)	6
Minnesota v. Murphy, ___ U.S. ___, 104 S.Ct. 1136 (1984).	3,6
Miranda v. Arizona, 384 U.S. 436 (1966)	7
Moss v. State, 539 S.W.2d 936 (Tex. Civ. App. 1976)	8
Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964)	5,7
Parham v. J.R., 442 U.S. 584 (1979)	6,7
People v. English, 31 Ill. 2d 301, 201 N.E.2d 455 (1964).	3
People v. Nastasio, 19 Ill. 2d 524 (1960)	5
People v. Redlich, 402 Ill. 270, 83 N.E.2d 736 (1949)	6
People v. Studdard, 51 Ill. 2d 190, 281 N.E.2d 678 (1972)	6
Roberts v. United States, 445 U.S. 552 (1980)	3,7
Sas v. Maryland, 295 F. Supp. 389 (D. Md. 1969), aff'd sub nom. Tippett v. Maryland, 436 F.2d 1153 (4th Cir. 1971), cert. dismissed sub nom. Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972)	8
State v. Matthews, 46 Or. App. 757, 613 P.2d 88, cert. denied, 450 U.S. 1040 (1980)	8
State ex rel. Kiritsis v. Marion Probate Court, 269 Ind. 550, 381 N.E.2d 1245 (1978)	9

United States v. Byers, 740 F.2d 1104 (D.C. Cir. 1984)... 8

United States v. Kordel, 397 U.S. 1 (1970)..... 4

United States v. Mandujano, 425 U.S. 564 (1976)..... 4

United States ex rel. Vajtauer v. Comm'r of Immigration at Port of New York, 273 U.S. 103 (1927)..... 6

8 Wigmore, Evidence § 2257 (McNaughton ed. 1961)..... 7

No. 85-5404

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

TERRY B. ALLEN,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari
To The
Illinois Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

A copy of the decision of the Illinois Supreme Court in People v. Allen, No. 60184 (Ill. Sup. Ct. July 17, 1985) is appended to the certiorari petition.

JURISDICTION

This Court maintains jurisdiction to review the judgment of the Illinois Supreme Court pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

Amplification and clarification of petitioner's factual statement have been incorporated within argument.

REASONS FOR DENYING THE WRIT

I.

THIS CASE PRESENTS AN UNSUITABLE OPPORTUNITY TO RE-EXAMINE WELL-ESTABLISHED DECISIONAL LAW.

Respondent believes that petitioner essentially seeks to challenge settled constitutional law. (See Argument II infra). In this connection, however, respondent also contends that this case is particularly ill-suited for a re-evaluation of the self-incrimination issue.

The Illinois Sexually Dangerous Persons Act, Ill. Rev. Stat. (1979) ch. 38 ¶ 105-1.01 et. seq., basically provides an involuntary mental health commitment procedure for recidivist sexual offenders. Allen's statements to psychiatrists were used to establish his status under that act. Allen freely waived any constitutional protection he may have had, however, to provide wholly voluntary disclosures.[1] In a related manner, because Allen chose to answer questions, there is no "compulsory" speech involved for a fifth amendment violation.

Before this decision, Illinois courts recognized a limited privilege against self-incrimination for sexually dangerous persons proceedings. People v. English, 31 Ill.2d 301, 201 N.E.2d 455 (1964). Moreover, only petitioner knew which solicited disclosures would be incriminating. Because the fifth amendment privilege is not self-executing, petitioner, represented by counsel, could be expected to refuse answers during the court-ordered interviews. Minnesota v. Murphy, _ U.S.__, 104 S.Ct. 1136, 1142-43 (1984)(disclosures of probationer were required but not compelled); Roberts v. United

---

[1] Before the interview, one of the psychiatrists told Allen that any disclosures could be included in the report submitted to the court and counsel. The examiner then received petitioner's complete understanding of the non-privileged nature of the examination. (R. 126-27). Petitioner, represented by counsel, cooperated fully with the psychiatrists to answer all questions. Indeed, one of the psychiatrists concluded that Allen wanted to be declared a sexually dangerous person to avoid criminal prosecution.

The Illinois Supreme Court also found petitioner's statements to be voluntary in the traditional sense. People v. Allen, slip op. at 6.

States, 445 U.S. 552, 560 (1980)(defendant was expected to assert the privilege during questioning conducted by the United States Attorney); Garner v. United States, 424 U.S. 648, 654-55 (1976)(taxpayer disclosures are required but not compelled absent privilege assertion); United States v. Mandujano, 425 U.S. 564, 574-75 (1976)(without claim of privilege, grand jury witness must answer questions); and United States v. Kordel, 397 U.S. 1, 9-10 (1970)(answers of counseled deponent who did not claim privilege were not compelled). Because there is no indication that Allen was "compelled" to speak to examining psychiatrists, this case is unsuitable for certiorari review of a fifth amendment compulsory self-incrimination claim.

II.

THE DECISION OF THE ILLINOIS COURT IS CONSISTENT WITH PUBLIC POLICY AND WELL-ESTABLISHED LAW.

Respondent is not aware of any decision of this Court which considers the applicability of the fifth amendment privilege against compulsory self-incrimination to a civil involuntary commitment proceeding. This does not mean that certiorari should be granted as a matter of course, however. Measured against the background of lower court case precedent, the Illinois Supreme Court decision was neither aberrational nor noteworthy. The decision challenged by petitioner represents merely the Illinois court's recognition of the well-established fifth amendment jurisprudence announced by other state and federal courts.

Indeed, the very issue sub judice may well have been resolved in dicta in this Court's decision in Estelle v. Smith, 451 U.S. 454 (1981). Although the prosecutor could not use unwarned statements to psychiatrists to enhance sentence in a criminal prosecution, this Court cautioned that "no fifth amendment issue would have arisen" if defendant's statements had been used for the "limited, neutral purpose of determining competency to stand trial". 451 U.S. at 465. As a result, respondent submits that the privilege is not implicated when

statements are used to establish mental illness, rather than criminal responsibility, in a civil proceeding.

The Illinois Supreme Court concluded that the privilege against self-incrimination is not available to shield disclosures in a SDP proceeding. People v. Allen, slip op. at 7. In his attempt to challenge the lower court's decision, petitioner misconstrues settled constitutional law in two ways. Petitioner first argues that the privilege is required to assure reliability of the SDP finding. (Pet. 9). Concern for false confessions may be somewhat unwarranted in a mental health context, because examining psychiatrists are wholly unconcerned with truthfulness of statement content. Allen's lies or distortions would have been equally helpful in these mental status evaluations designed to probe his thought processes. (R. 116). Equally important, reliability of the hearing mechanism is assured by procedural safeguards conferred by statute.[2] People v. Allen, slip op. at 6-7. The real concern of the fifth amendment, in contrast, is the source of the government's proof and the proper relationship between the individual and the state. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). The Illinois court was required to decide whether the government would be deprived of the "best evidence" of petitioner's mental state, for "it is only from the mouths of those having knowledge [of the pertinent subject matter] that the facts can be ascertained". Brown v. Walker, 161 U.S. 591, 610 (1896). See also Estelle v. Smith, 451 U.S. at 465 (State should not be deprived of the only effective means of contraverting defendant's proof).

Petitioner next argues that the liberty deprivation involved mandates recognition of the fifth amendment privilege. (Pet. 6). This is demonstrably incorrect. Despite the existence

---

[2] These include the right to trial by jury, the right to counsel, and the reasonable doubt standard of proof. Ill. Rev. Stat. (1979) ch. 38, pars. 105-5 and 105-3.01. The right to confront witnesses was recognized in People v. Nastasio, 19 Ill.2d 524 (1960).

of a significant liberty interest, safeguards associated with a criminal trial have been withheld by this Court in a variety of contexts. For example, the privilege against self-incrimination does not extend to probation revocation hearings. Minnesota v. Murphy, __U.S.__, 104 S.Ct. 1136 (1984). Concerning mental health proceedings specifically, the reasonable doubt standard of proof is not constitutionally required in involuntary commitment hearings. Addington v. Texas, 441 U.S. 418 (1979). Pre-commitment judicial hearings are not required for mentally ill children under Parham v. J.R., 442 U.S. 584 (1979). Finally, there is no constitutional right to trial by jury in juvenile delinquency hearings. McKeiver v. Pennsylvania, 403 U.S. 528 (1971). A less simplistic approach to the problem is clearly necessary.

In the past, this Court has examined both the nature of the proceeding and the content of the disclosures to determine the appropriate scope of the fifth amendment privilege. The fifth amendment provides that "[n]o person...shall be compelled in any criminal case to be a witness against himself" (emphasis supplied). The privilege has accordingly been withheld in civil proceedings generally. See, e.g., United States ex rel. Vajtauer v. Comm'r of Immigration at Port of New York, 273 U.S. 103 (1927). The Illinois Supreme Court denied the privilege upon the basis that Illinois Sexually Dangerous Persons proceedings are civil in name and fact, slip op. at 4, and that decision is well supported by state law. Ill. Rev. Stat. (1979) ch. 38 ¶ 105-3.01 (civil by definition); People v. Redlich, 402 Ill. 270, 83 N.E.2d 736 (1949)(civil proceedings which ascertain mental state rather than criminal culpability); and People v. Studdard, 51 Ill.2d 190, 281 N.E.2d 678 (1972)(recognizing legislative purpose to prevent criminal punishment of persons suffering from mental disorders). In sum, respondent endorses this Court's observation that

> unlike the delinquency proceedings in [In Re] Winship, [397 U.S. 358 (1970)], a civil commitment proceeding can in no sense be equated to a criminal prosecution.

Addington v. Texas, 441 U.S. at 428. The SDP proceeding is a medical inquiry, in which psychiatric testimony is received to formulate a treatment decision, for which the full panoply of criminal trial safeguards is inappropriate.[3] Parham v. J.R., 442 U.S. at 586. See also Estelle v. Smith, 451 U.S. at 475-76 (Rehnquist, J., dissenting)(Miranda warnings are inappropriate for forensic evaluations).

Respondent recognizes that availability of the privilege also turns on "the nature of the statement and the exposure which it invites". In Re Gault, 387 U.S. 1, 49 (1967), as cited in the petition at 6. Statement content is also considered in the fifth amendment calculus. Allen's statements were received as descriptions of his need for mental health commitment, however; they were not regarded as confessions of criminal liability. The fifth amendment is implicated only if there is a real exposure to criminal prosecution. 8 Wigmore, Evidence § 2257 (McNaughton ed. 1961). Well-established decisional law again affirms this point. The privilege protects only

> disclosures which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might so be used.

Murphy v. Waterfront Comm'n, 378 U.S. at 94. In the words of Mr. Justice Rehnquist describing forensic evaluations,

> the psychiatrist's interrogation...in the belief that the substance of [petitioner's] responses or the way in which he gave them might cast light on what manner of man he was[,] involved no 'compelled testimonial self-incrimination'.

Estelle v. Smith, 451 U.S. at 475 (citation deleted). See also the remarks of Mr. Justice Brennan concurring in Roberts v. United States, 445 U.S. at 562 (Miranda warnings are not

---

[3] Petitioner below also argued that Miranda v. Arizona, 384 U.S. 436 (1966) warnings are required to render statements admissible in an SDP proceeding. Because it held the fifth amendment privilege inapplicable, the Illinois Supreme Court did not reach this issue. (slip op. at 7). Respondent notes that petitioner was represented by counsel and respectfully refers this Court to the decisions in In Re Winstead, 67 Oh.App.2d 111, 425 N.E. 2d 943 (1980) and French v. Blackburn, 428 F. Supp. 1351 (D. N.C.), aff'd without op. 443 U.S. 901 (1977). See also Baxter v. Palmigiano, 425 U.S. 308, 315 (1976) (Miranda admonishments are not required in civil cases). This argument has not won acceptance in the lower courts.

required when the examiner does not seek to incriminate on the issue of criminal culpability) and California v. Byers, 402 U.S. 424, 429 (1971)(the fifth amendment is not applicable to compulsory disclosures that do not create "substantial hazards of incrimination"). The Illinois Supreme Court adequately recognized and protected petitioner's fifth amendment privilege by ruling that Allen's disclosures could not be used in any criminal prosecution. People v. Allen, slip op. at 8. Accord, Estelle v. Smith, 451 U.S. at 468-69. Because Allen's statements did not "incriminate" him, no privilege was available.

Respondent finally submits that the state maintains a legitimate, significant interest in retaining a civil treatment alternative for the mentally ill offender. Compare Pet. 10. The sovereign states unquestionably hold a parens patriae authority to provide treatment and rehabilitation to those involuntarily committed in their courts. Addington v. Texas, 441 U.S. at 426. Within constitutional limits, the state legislatures are free to devise means by which to combat the grave problem of the mentally ill, recidivist sexual offender. Restrictions without constitutional foundation will only serve to thwart legitimate state goals. United States v. Byers, 740 F.2d 1104 (D.C. Cir. 1984).

This Court has already declined to review a remarkably similar state court decision. Commonwealth v. Barboza, 387 Mass. 105, 438 N.E.2d 1064, cert. denied __U.S.__, 103 S.Ct. 385 (1982). A growing number of states have denied the fifth amendment privilege for involuntary commitment proceedings to provide the lead now followed by Illinois. Moss v. State, 539 S.W.2d 936 (Tex. Civ. App. 1976); State v. Matthews, 46 Or. App. 757, 613 P.2d 88, cert. denied 450 U.S. 1040 (1980); Cramer v. Tyars, 151 Cal. Rptr. 653, 23 Cal.3d 131, 588 P.2d 793 (1979)(en banc); In Re Beverly, 342 So.2d 481 (Fla. Sup. Ct. 1977); Sas v. Maryland, 295 F.Supp. 389 (D. Md. 1969), aff'd sub nom. Tippett v. Maryland, 436 F.2d 1153 (4th Cir. 1971), cert. dismissed sub nom. Murel v. Baltimore City

Criminal Court, 407 U.S. 355 (1972); and State ex rel. Kiritsis v. Marion Probate Court, 269 Ind. 550, 381 N.E.2d 1245 (1978).

Because the several states have reached the same conclusion, a conclusion which respects established decisional law and sound public policy, there is no need for this Court to provide authoritative guidance at this time. Indeed, petitioner's argument essentially rejects the prior pronouncements of this Court. There is no need for certiorari review as a result.

CONCLUSION

For these reasons, respondent State of Illinois respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General
State of Illinois

ROMA J. STEWART
Solicitor General
State of Illinois

MARK L. ROTERT

SALLY L. DILGART
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 917-2570

Counsel for Respondent.

October 4, 1985

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

DISTRIBUTED
OCT 15 1985

ORIGINAL

RECEIVED
OCT 14 1985
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 85-5404

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

Supreme Court, U.S.
FILED
OCT 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

TERRY B. ALLEN, Petitioner

-vs-

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent

ON PETITION FOR A WRIT OF CERTIORARI

TO THE

ILLINOIS SUPREME COURT

REPLY BRIEF FOR PETITIONER

ROBERT AGOSTINELLI
Deputy Defender

PETER A. CARUSONA*
Assistant Defender

Office of the State Appellate
Defender
628 Columbus Street - Suite 308
Ottawa, Illinois 61350
(815) 434-5531

COUNSEL FOR PETITIONER

VERLIN R. F. MEINZ
Assistant Defender
Office of the State
Appellate Defender
628 Columbus - Suite 308
Ottawa, Illinois 61350
(815) 434-5531

JEAN HERIGODT
Assistant Public Defender
6107 N. Sauganash
First Floor
Chicago, Illinois 60646
(312) 545-2953

OF COUNSEL

*COUNSEL OF RECORD

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES. 2

REASONS FOR GRANTING THE WRIT 3

CONTRARY TO THE POSITION OF THE RESPONDENT, PROSECUTION UNDER THE SEXUALLY DANGEROUS PERSONS ACT CANNOT BE EQUATED WITH A CIVIL MENTAL COMMITMENT PROCEEDING SINCE IT IS NOT MERELY AN INQUIRY INTO MENTAL CONDITION. IN ADDITION TO PROVING A PERSON CHARGED TO BE SEXUALLY DANGEROUS IS MENTALLY ILL, THE PROSECUTION MUST ALSO SHOW THAT THE ILLNESS IS COUPLED WITH PROPENSITIES TO COMMIT SEX OFFENSES AND THAT THE DEFENDANT HAS, IN FACT, DEMONSTRATED SUCH PROPENSITIES. THE ILLINOIS SUPREME COURT'S HOLDING THAT A DEFENDANT IN CUSTODY CAN BE COMPELLED TO ANSWER QUESTIONS ABOUT PENDING CRIMINAL CHARGES AND PURPORTED PAST SEXUAL MISCONDUCT AND THAT HIS ANSWERS CAN BE USED TO COMMIT HIM TO THE DEPARTMENT OF CORRECTIONS FOR AN INDETERMINATE PERIOD OF TIME OFFENDS THE PURPOSE OF THE FIFTH AMENDMENT PRIVILEGE. MOREOVER, THE COURT'S HOLDING, CONTRARY TO THE RESPONDENT'S CLAIM, IS UNIQUE AND IS NOT SUPPORTED BY THE CASE LAW FROM OTHER JURISDICTIONS 3

CONCLUSION. 7

TABLE OF AUTHORITIES

Page

Cases

Commonwealth v. Barboza, 387 Mass. 105, 438 N.E.2d 1064 (1982) 4

Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981). 5

Minnesota v. Murphy, ___ U.S. ___, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984) 5

People v. Allen, 123 Ill. App. 3d 669, 463 N.E.2d 135 (3d Dist. 1984) 6

Powell v. Texas, 392 U.S. 514, 88 S. Ct. 2145, 20 L. Ed. 2d 1254 (1968). 4

Statutes

Ill. Rev. Stat. 1981, ch. 38, §105-9. 3

Ill. Rev. Stat. 1981, ch. 38, §105-1.01 4

REASONS FOR ALLOWING THE WRIT

CONTRARY TO THE POSITION OF THE RESPONDENT, PROSECUTION UNDER THE SEXUALLY DANGEROUS PERSONS ACT CANNOT BE EQUATED WITH A CIVIL MENTAL COMMITMENT PROCEEDING SINCE IT IS NOT MERELY AN INQUIRY INTO MENTAL CONDITION. IN ADDITION TO PROVING A PERSON CHARGED TO BE SEXUALLY DANGEROUS IS MENTALLY ILL, THE PROSECUTION MUST ALSO SHOW THAT THE ILLNESS IS COUPLED WITH PROPENSITIES TO COMMIT SEX OFFENSES AND THAT THE DEFENDANT HAS, IN FACT, DEMONSTRATED SUCH PROPENSITIES. THE ILLINOIS SUPREME COURT'S HOLDING THAT A DEFENDANT IN CUSTODY CAN BE COMPELLED TO ANSWER QUESTIONS ABOUT PENDING CRIMINAL CHARGES AND PURPORTED PAST SEXUAL MISCONDUCT AND THAT HIS ANSWERS CAN BE USED TO COMMIT HIM TO THE DEPARTMENT OF CORRECTIONS FOR AN INDETERMINATE PERIOD OF TIME OFFENDS THE PURPOSE OF THE FIFTH AMENDMENT PRIVILEGE. MOREOVER, THE COURT'S HOLDING, CONTRARY TO THE RESPONDENT'S CLAIM, IS UNIQUE AND IS NOT SUPPORTED BY THE CASE LAW FROM OTHER JURISDICTIONS.

The respondent claims that a prosecution under the Sexually Dangerous Persons Act (Article 105 of the Illinois Code of Criminal Procedure) essentially provides an involuntary mental health commitment procedure for recidivist sexual offenders and merely involves an inquiry into mental illness. Brief for Respondent at 3. These assertions are false.

In the first place, sexually dangerous persons are not committed to the Illinois Department of Mental Health; they are committed to Illinois Department of Corrections and are routinely housed with other sex offenders. Ill. Rev. Stat. 1981, ch. 38, §105-9; See Brief for Petitioner at 7.

Secondly, as noted by the Illinois Supreme Court, a sexually dangerous persons prosecution is more than just an inquiry into mental illness. In addition to requiring proof that the defendant suffers from a mental disorder, the prosecution must prove

the existence of criminal propensities to the commission of sex offenses and the existence of demonstrated propensities toward acts of sexual assault. Ill. Rev. Stat. 1981, ch. 38, §105-1.01; See Slip op. at 8. In this case Terry Allen's statements about the charged crime and purported past misconduct were used to prove he was sexually dangerous. His statements as to past crimes were particularly important since he had no prior criminal record of any sex offense. Proceedings under the Act thus resemble criminal prosecutions far more than civil mental commitment actions since the Act does not punish the mere status of mental illness, but instead punishes status plus conduct. Cf. Powell v. Texas, 392 U.S. 514, 88 S. Ct. 2145, 20 L. Ed. 2d 1254 (1968) (chronic alcoholic can be prosecuted criminally for appearing in public while drunk).

Contrary to the claim by respondent, the holding of the Illinois Supreme Court is unique. No other jurisdiction requires that a defendant answer incriminatory questions about charged and purported past sex offenses and then allows the use of any admissions at trial to establish the defendant is sexually dangerous. Commonwealth v. Barboza, 387 Mass. 105, 438 N.E.2d 1064 (1982), which the respondent claims is remarkably similar to this case, actually involves a radically different proceeding. In Massachusetts the sexually dangerous person proceeding is initiated after a criminal trial is held, but before sentencing. Moreover, in Massachusetts the defendant has an evidentiary privilege which provides that incriminatory statements are not admissible on the question of guilt. The instant case, however, involves a proceeding in lieu of criminal prosecution and the defendant's admissions about the charged crimes and prior misconduct are admissible on the question of his guilt, i.e., his status as a sexually dangerous person. This Honorable Court thus should not be misled by the respondent's spurious claim that the holding in this case is the same as that in Massachusetts and

several other jurisdictions. The holding below is, in fact, unique.

Finally, the respondent argues, in an apparent attempt to divert attention from the express holding of the Illinois Supreme Court, that petitioner Allen was not compelled to answer questions and that he waived any constitutional protections. This argument is without merit.

The holding below is that the Fifth Amendment privilege does not even apply to a sexually dangerous persons proceeding. Thus, Illinois defendants charged to be sexually dangerous must answer all questions at compulsory psychiatric examinations and their admissions, including any about the charged crime and past misconduct, may be admitted at trial. Obviously, the court below established a rule of law which will compel all future Illinois defendants charged to be sexually dangerous to answer incriminatory questions. This precedent merits this Court's review.

Moreover, the holding below applies to defendants, who, like Allen, are in custody when he underwent his compulsory psychiatric examinations. The respondent ignores the fact that Allen was in custody. The fact of his custody, of course, is crucial since statements obtained from suspects in custody during a court-ordered psychiatric examination cannot be regarded as freely and voluntarily given unless the defendant is appraised of his rights and has knowingly elected to waive them. Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359, 373 (1981). See Minnesota v. Murphy, ___ U.S. ___, 104 S. Ct. 1136, 79 L. Ed. 2d 409, 420-421 (1984).

In this case the Illinois Supreme Court declined to review the State's claim that Allen had waived any privilege since it held the privilege did not apply (Slip op. at 8). Thus, the State's discussion of waiver is irrelevant and unnecessarily diverts attention from the question involved in this case. Mr.

Allen would note, however, that the Appellate Court expressly held that defendant's statements were unwarned and that he did not waive his Fifth Amendment privilege. People v. Allen, 123 Ill. App. 3d 669, 463 N.E.2d 135, 137 (3d Dist. 1984).[1]

---

[1] In this regard the court stated as follows:

> We find Estelle v. Smith directly applicable to the compulsory psychiatric examinations to which this defendant was subjected and which the trial court must have relied upon to establish all three elements which the statute required be satisfied in order to find the defendant a sexually dangerous person. The record clearly shows that defense counsel objected to the admission of the psychiatrists' testimony on the grounds that the defendant must not be forced to incriminate himself. Dr. Colen never warned the defendant that anything he said might later be used to find him sexually dangerous nor did Dr. Beck give an adequate warning. Therefore, the trial court could not rely solely upon the defendant's unwarned statements to the psychiatrists to find the defendant a sexually dangerous person. 463 N.E.2d at 137 (citation omitted).

CONCLUSION

There are compelling reasons to allow the writ in this case. The Illinois Supreme Court's holding that defendants charged to be sexually dangerous must undergo custodial psychiatric examinations and answer all incriminating questions about the charged and past crimes is unjust. The holding offends the purpose of the Fifth Amendment privilege against self-incrimination since it allows the defendant's compelled admissions to be used to prove a defendant is sexually dangerous, resulting in his confinement in the Department of Corrections for an indefinite period of time, i.e., until he can prove that he is no longer sexually dangerous. The court's holding will encourage Illinois prosecutors to initiate sexually dangerous persons proceedings where the State's criminal case is weak and/or where the defendant has no prior record of sexual offenses. By initiating such a charge, the prosecution can compel a defendant to make incriminating statements. This wholly inquisitorial procedure merits this Court's review.

ROBERT AGOSTINELLI
Deputy Defender

PETER A. CARUSONA*
Assistant Defender
Office of the State Appellate Defender
628 Columbus Street - Suite 308
Ottawa, Illinois 61350
(815) 434-5531
COUNSEL FOR PETITIONER

VERLIN R. F. MEINZ
Assistant Defender
Office of the State Appellate Defender
628 Columbus - Suite 308
Ottawa, Illinois 61350
(815) 434-5531

JEAN HERIGODT
Assistant Public Defender
6107 N. Sauganash
First Floor
Chicago, Illinois 60646
(312) 545-2953

OF COUNSEL

*COUNSEL OF RECORD

No. 85-5404

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

TERRY B. ALLEN, Petitioner

-vs-

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent

CERTIFICATE OF SERVICE

I, Peter A. Carusona, a member of the bar of this Court and representing Petitioner in this cause, certify:

(1) I have served one copy of the Reply Brief on counsel for Respondent, by depositing same in a United States Post Office mail box at 628 Columbus Street, Ottawa, Illinois 61350, with first class postage prepaid, and with the envelope addressed as follows:

Ms. Sally L. Dilgart
Assistant Attorney General
State of Illinois Center
100 W. Randolph Street
12th Floor
Chicago, Illinois 60601.

(2) The above-named party is the only party required to be served.

(3) I further state to the best of my knowledge that the Court's copies of these documents were enclosed in an envelope, properly addressed to the Clerk of this Court, and that said envelope was deposited in a United States mail box at 628 Columbus Street, Ottawa, Illinois 61350, with first class postage prepaid, on the 10th day of October, 1985, which is within the permitted time of filing.

PETER A. CARUSONA

SUBSCRIBED AND SWORN TO
Before me this 10th day
of October, 1985.

Notary Public

Supreme Court, U.S.
FILED
DEC 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

(4)

No. 85-5404

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TERRY B. ALLEN,

Petitioner,

v.

ILLINOIS,

Respondent.

On Writ Of Certiorari
To The Illinois Supreme Court

JOINT APPENDIX

Robert Agostinelli
Deputy Defender
VERLIN R. MEINZ
*PETER A. CARUSONA
Assistant Defenders
Office of the State Appellate Defender
628 Columbus Street, Suite 308
Ottawa, Illinois 61350
(815) 434-5531
Counsel for Petitioner
JEAN HERIGODT
Assistant Public Defender
6107 N. Sauganash
First Floor
Chicago, Illinois 60646
(312) 545-2953
Of Counsel
* *Counsel of Record*

NEIL F. HARTIGAN
Attorney General
State of Illinois
ROMA J. STEWART
Solicitor General
State of Illinois
MARK L. ROTERT
*SALLY L. DILGART
Assistant Attorney General
State of Illinois Center
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 917-2570
Counsel for Respondent

PETITION FOR WRIT OF CERTIORARI FILED SEPTEMBER 16, 1985
CERTIORARI GRANTED NOVEMBER 12, 1985

57 pp
6 docs

TABLE OF CONTENTS

	Page
Chronological List of Relevant Docket Entries	iii
Information—Count 1—Filed October 14, 1982, in the Circuit Court of the Tenth Judicial Circuit, Peoria County [hereinafter trial court]	1
Information—Count 2—Filed October 14, 1982, in the Trial Court	2
Petition Filed November 5, 1982, in the Trial Court	3-4
Order of the Trial Court Filed November 5, 1982	5
Final Order of the Trial Court Filed December 17, 1982	6
Bill of Indictment Filed January 4, 1983, in the Trial Court	7-8
Arraignment Order Filed March 2, 1983, in the Trial Court	9
Oral Order of Trial Court Allowing State's Motion to Strike Paragraph Four of Petition	10
Trial Order Filed March 4, 1983	11
Motion to Vacate Filed March 22, 1983, in the Trial Court	12
Order of the Trial Court Filed March 22, 1983	13
Supplemental Motion to Vacate Filed March 31, 1983, in the Trial Court	14-16
Memorandum in Response to Defendant's Supplemental Motion to Vacate Filed April 12, 1983, in the Trial Court	17-20
Order of the Trial Court Filed May 3, 1983	21
Notice of Appeal Filed May 12, 1983, in the Trial Court	22
Opinion of the Appellate Court of Illinois, Third Judicial District, Filed on April 16, 1984, affirming conviction	23-28
Motion For Leave to Supplement the Record Filed in the Illinois Supreme Court	29-30
Order of the Illinois Supreme Court Allowing Motion For Leave to Supplement Record on Appeal, Filed December 3, 1984	31
Dr. Colen's Report (Letter 11/11/82) Filed in the Illinois Supreme Court	32-35
Dr. Beck's Report (Letter 11/12/82) Filed in the Illinois Supreme Court	36-40

Table of Contents Continued

Page

Opinion of the Illinois Supreme Court Filed on July 17, 1983, affirming conviction 41-52

Order of the United States Supreme Court Granting Leave to Proceed *in forma pauperis* and the Petition for Writ of Certiorari 53

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

ITEM	DATE
Information	October 14, 1982
Petition to Declare Defendant Sexually Dangerous	November 5, 1982
Order of Trial Court	November 5, 1982
Order of Trial Court	December 17, 1982
Indictment	January 4, 1983
Order of Trial Court	March 2, 1983
Order of Trial Court	March 4, 1983
Order of Trial Court	March 22, 1983
Order of Trial Court	May 3, 1983
Notice of Appeal	May 12, 1983
Opinion of Illinois Appellate Court, Third Judicial District	April 16, 1984
Order of Illinois Supreme Court	December 3, 1984
Order of United States Supreme Court	November 12, 1985

STATE OF ILLINOIS PEORIA COUNTY
IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT

IN CUSTODY 82-4445 COUNTY
D04320641 DCN
Suggested Bond $50,000

THE PEOPLE OF THE STATE OF ILLINOIS,
CITY OF PEORIA, a municipal corporation,
v.
TERRY B. ALLEN
719 Laura, Peoria, Ill. *Defendant*

Case No. 82CF4394

INFORMATION

Count 1 of 2, Class X

The Undersigned Charges:

That on or about October 11, 1982, in said Peoria County, State of Illinois Terry B. Allen committed the offense of Deviate Sexual Assault in that he, being of the age of 14 years and upwards, by threat of force compelled Christine Ray to perform an act of deviate sexual conduct in that he placed his sex organ in the mouth of Christine Ray, in violation of: Paragraph 11-3a, of Chapter 38, Illinois Revised Statutes.

The undersigned, on oath, says that the facts set forth above are true in substance and matter of fact.

JOHN A. BARRA, State's Attorney

By: STEPHEN PATTELLI

Sworn to me this 14th day of October, 1982. Kay F. Welch, Notary Public.

ORDER

☒ Bail Set at $50,000. ☐ Warrant of Arrest to Issue. ☒ In custody, Directive to Sheriff for October 14, 1982, at 3:30 a.m. Summons to Issue for Appearance on ____, 19__, at ____a.m./p.m. Entered 10-14-82

STATE OF ILLINOIS PEORIA COUNTY
IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT

THE PEOPLE OF THE STATE OF ILLIONIS,
CITY OF PEORIA, a municipal corporation,
v.
TERRY B. ALLEN *Defendant*

Case No. 82CF4394

INFORMATION

Count 2 of 2, Class 4

The Undersigned Charges:

That on or about October 11, 1982, in said Peoria County, State of Illinois Terry B. Allen committed the offense of Unlawful Restraint in that he knowingly and without legal authority detained Christine Ray, in violation of: Paragraph 10-3a, of Chapter 38, Illinois Revised Statutes.

The undersigned, on oath, says that the facts set forth above are true in substance and matter of fact.

JOHN A. BARRA, State's Attorney
By: STEPHEN PATTELLI

Sworn to me this 14th day of October, 1982. Kay F. Welch, Notary Public.

ORDER

☐ Bail Set at ____. ☐ Warrant of Arrest to Issue. In custody, Directive to Sheriff for _____, 19__, at ____a.m./p.m. ☐ Summons to Issue for Appearance on ____, 19__, at ____a.m./p.m. Entered 10-14-82

IN THE CIRCUIT COURT OF
THE TENTH JUDICIAL CIRCUIT OF ILLINOIS
PEORIA COUNTY
TRIAL DIVISION

Case No. 82 CF 4394

PEOPLE OF THE STATE OF ILLINOIS

Plaintiffs

v.

TERRY B. ALLEN

Defendant

PETITION

Now come the People of the State of Illinois by John A. Barra, State's Attorney of Peoria County and by Donald J. Toohill, Assistant State's Attorney of Peoria County, on this 5th day of November, 1982, and Petition this Court to declare the defendant Terry B. Allen a Sexually Dangerous Person pursuant to Illinois Revised Statutes, Chapter 38, Article 105, Section 1.01 et. seq. and in support thereof state as follows:

1. The defendant is currently charged with the criminal offense of Deviate Sexual Assault in violation of Illinois Revised Statutes, Chapter 38, Section 11-3a in the above case;

2. The defendant is presently suffering from a mental disorder which has existed for a period of more than one (1) year prior to this date;

3. The defendant has criminal propensities to the commission of sexual offenses and has demonstrated propensities toward acts of sexual assault on or about October 11, 1982, in Peoria County, State of Illinois,

he committed the offense of Deviate Sexual Assault in that he, being of the age of 14 years and upwards, by force or threat of force compelled Christine Ray to perform an act of deviate sexual conduct in that he placed his sex organ in the mouth of Christine Ray,

4. The defendant has been under psychiatric treatment as recently as March-June of 1982.

THEREFORE, The People pray that the Court appoint two qualified psychiatrists to examine said defendant and hold a hearing on said Petition and thereafter declare the defendant a Sexually Dangerous Person and grant any other relief allowed under section 105 of Chapter 38, Illinois Revised Statutes.

Respectfully submitted,

JOHN A. BARRA, State's Attorney
Peoria County, Illinois
By: /s/ DONALD J. TOOHILL
Assistant State's Attorney
Peoria County, Illinois

AFFIDAVIT

I have been first duly sworn and put under oath hereby state that I have read the above Petition and it is true and correct statement of facts.

/s/AFFIANT

Subscribed and Sworn to before me, a Notary Public, this 5 day of November, 1982.

/s/KAY F. WELCH
Notary Public

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ILLINOIS
PEORIA COUNTY

Case No. 82 CF 4394

PEOPLE OF THE STATE OF ILLINOIS *Plaintiff*
v.
TERRY B. ALLEN *Defendant*

ORDER

Now on this 5th day of November, 1982, the defendant is present in open court with counsel Susan Lucas, People are present by Donald J. Toohill, Assistant State's Attorney, the court finds that the people have filed a Petition for Proceedings herein under the Sexually Dangerous Persons Act, Chapter 38, Section 105 et seq. and defendant is served with a copy of said Petition and the procedure and rights under said act are explained to him and he indicates he understands the nature of the proceedings.

Pursuant to said petition the court orders that the following psychiatrists are appointed to examine the defendant herein.

1. Dr. Bradford E. Colen
2. Dr. Mortimer Beck

It is further ordered that the Sheriff of Peoria County transport the defendant for said examinations as follows:

1. To the office of Dr. Colen, Suite 301, Glen Oak Medical Plaza, 120 N.E. Glen Oak, Peoria, Ill. at the hour of 1:00 p.m. on Thursday, November 11, 1982.
2. To the office of Dr. Beck, 4617 N. Prospect Rd., Peoria Heights, Ill. at the hour of 1:00 p.m. on Friday, November 12, 1982.

At the completion of said examinations, return the defendant to the Peoria County Jail where he is to be held subject to bond herein and further Order of the Court.

ENTERED: 11/05/82

/s/JUDGE OF THE TENTH JUDICIAL CIRCUIT

STATE OF ILLINOIS, PE[redacted] COUNTY IN THE CIRCUIT COURT OF T[redacted]ENTH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS,
CITY OF PEORIA, A MUNICIPAL CORPORATION
Plaintiff,

vs.

Terry B. Allen
Defendant.

Case No. 82CF4394

JUDGE Bridge	COURT REPORTER	PLTF. ATTY: Todd U	
Date 12-17-82 Court Room 405	Court Clerk Meyer	ATTY: DEFT Lucas	

FINAL ORDER

THE DEFENDANT HAVING BEEN CALLED INTO OPEN COURT ON THIS DATE, AND:

- ☐ 1. The Defendant understandingly waives his right to a jury trial, having been fully advised of his right herein;
- ☐ 2. The Defendant enters a Plea of Not Guilty and requests a jury/bench trial;
- ☐ 3. The Defendant enters a Plea of Not Guilty.
- ☐ 4. The Defendant enters a Plea of Guilty without any agreement as to sentence after being informed of the nature of the charge, the minimum and maximum possible penalties provided by law and the consequences thereof for each charge in the Complaint/Informaton;
- ☐ 5. After full admonishment as to his rights, the defendant enters a plea of guilty pursuant to the terms of a negotiated plea agreement and the Court finds that there is a factual basis for the plea and accepts the agreement, after the defendant is informed of the minimum and maximum possible penalties provided by law and the consequences thereof for each charge in the Complaint/Information;
- ☐ 6. Although duly notified of the time and place of this hearing, the Defendant fails to appear after being called in open Court so to do;
- ☒ 7. A full preliminary hearing is conducted on this date;
- ☐ 8. Other _____

IT IS HEREBY ORDERED:

- ☐ A. The Court enters a Judgment of Not Guilty for the offense of _____
- ☐ B. The Court enters a Judgment Finding of Guilty for the said Defendant and convicts him of the offense of _____ as charged in the Complaint/Information, and
- ☐ C. Without entering judgment of guilt and with the consent of the Defendant, the Court accepts the defendant's plea of guilty and defers further proceedings and:
  - a. Places Defendant on Probation for ___ months years pursuant to Chapter 56½, Para. (710/1410) of the I.R.S.
  - b. Court Supervision is ordered for ___ months years pursuant to Chapter 38, Para. 1005-6-1, I.R.S. Defendant subject to Court Supervision's Rules and Regulations.

  THE COURT FURTHER ORDERS THAT:
  - ☐ 1. The Defendant is sentenced to pay a fine of _____, and is ordered to pay costs of _____.
  - ☐ 2. The Defendant is given until _____, 19 ____, at _____ A.M./P.M. in courtroom _____, to pay fine and costs, and if it is not paid by that date, Defendant must appear at that time in this court and show cause as to why he should not be held in contempt of court for his failure to pay.
  - ☐ 3. The Defendant make restitution as follows: _____ by _____, 19 ____
  - ☐ 4. A sentence of imprisonment for _____ days/months is imposed on the Defendant, and is to be served at:
    - ☐ a. The Peoria County Jail
    - ☐ b. The State Dept. of Corrections at _____
    - ☐ c. _____
  - ☐ 5. A sentence of periodic imprisonment for _____ days/months is imposed on the Defendant, and is to be served at:
    - ☐ a. The Peoria County Jail
    - ☐ b. The Peoria County Work Release Center, pursuant to its Rules and Regulations.
    - ☐ c. _____
  - ☐ 6. A sentence of Probation/Conditional Discharge for _____ days/months/years is imposed on the Defendant, subject to the conditions set forth in the attached Certificate of Probational/Conditional Discharge which is made a part hereof.
  - ☐ 7. Defendant is to enter into a recognizance of $ _____, with/without surety, to keep the peace towards all people of this state, especially toward the complainant, for a period of _____ pursuant to Chapter 38, Section 200-6 of the Illinois Revised Statutes, subject to the penalties provided by the law if he shall refuse.
  - ☐ 8. Defendant is to enter into a recognizance of $ _____, with/without surety, to keep the peace pursuant to Chapter 38, Section 200-6 of the Illinois Revised Statutes, subject to the penalties provided by law if he shall refuse.
- ☒ D. The Court orders Count(s) all / the ~~complaint~~ dismissed after the Preliminary Hearing was held and no probable cause was found/~~no Preliminary Hearing was held for failure of witnesses to appear OR for lack of sufficient evidence to proceed.~~
- ☐ E. The Court orders Count(s) _____ of Complaint/the Information dismissed on motion of People/Defendant/Court.
- ☐ F. Defendant's appeal rights fully explained pursuant to Chapter 110A, Para. 605.
- ☒ G. Other: Defendant advised by [illegible]

ENTERED: 12/17/82

Judge of the Tenth Judicial Circuit

6

STATE OF ILLINOIS PEORIA COUNTY
IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT

THE PEOPLE OF THE STATE OF ILLINOIS,
v.
TERRY B. ALLEN
719 Laura, Peoria, Ill. DOB: 1-3-59 *Defendant*

Case No. 82 CF 4394
82-4445 County

BILL OF INDICTMENT

THE GRAND JURY CHARGES In Count 1 of 2, a Class X:

That on or about October 11, 1982, in said Peoria County, State of Illinois, Terry B. Allen committed the offense of Deviate Sexual Assault in that he, being of age of 14 years and upwards, by force compelled Christine Ray to perform an act of deviate sexual conduct in that he placed his sex organ in the mouth of Christine Ray, in violation of Paragraph 11-3a, of Chapter 38, Illinois Revised Statutes.

Filed: Jan. 4, 1983

STATE OF ILLINOIS PEORIA COUNTY
IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT

THE PEOPLE OF THE STATE OF ILLINOIS,
v.
TERRY B. ALLEN
719 Laura, Peoria, Ill. DOB: 1-3-59 *Defendant*

Case No. 82 CF 4394
82-4445 County

BILL OF INDICTMENT

THE GRAND JURY CHARGES In Count 2 of 2, a Class 4

That on or about October 11, 1982, in said Peoria County, State of Illinois, Terry B. Allen committed the offense of Unlawful Restraint in that he, knowingly and without legal authority detained Christine Ray, in violation of paragraph 10-3a, of Chapter 38, Illinois Revised Statutes.

A TRUE BILL
/s/FRED E. DICKINSON
Foreman

List of Witnesses

Detective Dale Wood, Peoria County Sheriff's Department
Christine Ray, R.R. 1, Farmington, Illinois

ORDER

This indictment having been returned in open court this 4th day of January, 1983, this case is hereby assigned to Judge Eagleton in courtroom B.

☒ Warrant of Arrest is ordered to issue, Bail is set at $10,000.

Entered January 4, 1983

/s/JUDGE

ASST. STATES ATTORNEY ASSIGNED /s/ L. PALUSKA

STATE OF ILLINOIS, PEORIA COUNTY
IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT

FILE STAMP

[illegible] 1983

[illegible] Clerk of the Circuit Court
Peoria County, Illinois

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

vs.

Defendant.

CASE No. 82 CF 4394

ARRAIGNMENT ORDER

JUDGE Terry B. Allen / Eagleton		COURT REPORTER Haberer	PLTF ATTY: Palluska	
DATE: 3-2-83	COURTROOM B	CLERK Joos	ATTY: DEFT Tilton PD	CHECK IF PRESENT

The Defendant having been called into Open Court on this date, and:

☐ 1. Defendant is present and is informed of the charge in the _____ and furnished with a copy thereof;

☐ 2. The Defendant desires Court appointed counsel and the Court determines the Defendant is indigent;

☐ 3. The Defendant requests additional time for private counsel to appear;

7. Counsel identified above appears for the Defendant;

8. The Defendant waives the reading or explanation of the charge.

9. The Defendant moves that the People furnish Discovery pursuant to Supreme Court Rules;

10. The Defendant enters a plea of Not Guilty to each count of the charge;

11. The People move that the Defendant furnish Discovery pursuant to Supreme Court Rules;

X 12. The Defendant waives a Jury Trial and requests a Bench Trial on Petition

☐ 13. The People/Defendant move(s) for a continuance;

X 14. Other People move to strike paragraph 4 of the petition.

IT IS HEREBY ORDERED THAT:

☐ A. The Public Defender is/is not appointed for the Defendant;

☐ B. This matter is continued on Defendant's motion to _____, 19____, at _____ A.M. P.M.

☐ C. This matter is continued on State's motion to _____, 19____, at _____ A.M. P.M.

☐ D. This matter is continued by agreement to _____, 19____, at _____ A.M. P.M.

☐ E. The People are to furnish Discovery pursuant to Supreme Court Rules by _____, 19____.

☐ F. The Defendant is to file all motions preliminary to a plea by _____.

X G. The hearing on motions ~~filed and to strike language from petition~~ To Strike paragraph 4 of petition is set for 3-4-83 at 9:15 A.M. P.M.

☐ H. The Defendant is to furnish Discovery pursuant to Supreme Court Rules by _____, 19____.

☐ I. The Scheduling Conference is set for _____, 19____, at _____ A.M. P.M.

X J. The ~~Jury~~/Bench Trial on the Petition is set for March 4, 19 83, at 9:15 A.M. ~~P.M.~~

~~K. Other: Paragraph 4 of petition is stricken~~

ENTERED: 3/2/83

Richard S. Engbretson

JUDGE OF THE TENTH JUDICIAL CIRCUIT

STATE OF ILLINOIS PEORIA COUNTY
IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT

[R75] WHEREUPON THE FOLLOWING PROCEEDINGS WERE DULY HAD:

The Court: This is 82 CF 4394. People versus Terry B. Allen. This is a hering on the State's Petition filed November 5th, and reinstated later to have the defendant declared a sexually dangerous person.

You may proceed for the State.

Mr. Paluska: Judge, I made a Motion a couple days ago to strike Paragraph 4.

The Court: You wanted some time to consider that Motion? Shall we rule on that first? Any objection to striking Paragraph 4?

Mr. Tilton: No, Judge.

The Court: Motion is allowed.

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ILLINOIS
PEORIA COUNTY

FILED
MAR 1 1983
LEO E. SULLIVAN
Clerk Of The Circuit Court
Peoria County, Illinois

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,

vs.

Jerry B. Allen Defendant.

CASE No. 82 CF 4394

Judge: Eagleton		Crt. Rep: Haberkorn / Valdez	Plt. Atty: Palusha ✓
Date: 3-4-83	Crt. Rm: B	Crt. Clerk: Joos	Def. Atty: Tilton PD ✓

TRIAL ORDER

The defendant being present in open Court in person and with his attorney, the Court finds that:

[X] 1. The ~~trial of this cause~~ hearing on petition was commenced on 3-4, 19 83;

2. [ ] a. The defendant and his counsel, and the States Attorney on behalf of the People were present in open Court at all stages of the trial of this case, and that a jury of twelve plus _____ alternate juror(s) (was/were) selected, accepted by all parties and sworn by the clerk to try the issues in the case, and that both parties were present for the selection of the jury and the jury returning its verdict(s) into open Court, and that all the members of the jury were present as required by law during the trial of this case, including the returning of the verdict(s) into open Court;

[ ] b. The Court held a conference on jury instructions with counsel for both parties outside of the presence of the jury and that, thereafter, the Court instructed the jury as to the law applicable to the case, the bailiffs were sworn by the clerk to take charge of the jury during its deliberations, the alternate jurors were discharged from further consideration of the case, and the jury at _____ A.M./P.M., on _____, 19 _____, in custody of the bailiffs, retired to the jury room to commence its deliberations;

[ ] c. The Court took the matter under advisement, with decision to be announced at a later date.

3. [ ] a. The defendant waived his right to a trial by jury in open Court on _____, 19 _____, and trial was thereafter conducted by the Court, with the defendant and his counsel and the people by the States Attorney being present in open Court at all stages of the trial;

[X] b. At the close of all evidence from both parties the Court began its deliberations at 4:00 ~~A.M.~~/P.M. on 3-4, 19 83;

[ ] c. The Court took the matter under advisement, with decision to be announced at a later date.

[X] 4. That on 3-4, 19 83, at 4:10 ~~A.M.~~/P.M. the (Court/~~jury~~) returned its [finding(s) ~~verdict(s)~~] in open Court as follows: To be a sexually dangerous person.

[X] a. The (Court/~~jury~~) finds the defendant ~~not guilty~~;

[ ] b. The (Court/jury) finds the defendant guilty of _____;

[ ] 5. That said verdict(s) (was/were) signed by the foreman of the jury, and the eleven other jurors;

6. [ ] a. The polling of the jury is waived by both parties;

[ ] b. The jury is polled and, all jurors answering in the affirmative, the Court finds the verdict(s) to be the true verdict(s) of the jury;

[X] 7. Other: Court finds also that defendant is suffering from a mental disorder, which has existed for a period not less than one year; that Δ has propensities to commit sex offenses and Δ has demonstrated said propensities.

IT IS ORDERED THAT:

[ ] A. The [finding(s) of the Court/verdict(s) of the jury] (is/are) hereby received and (is/are) entered of record;

[ ] B. The jury be and is hereby discharged from further consideration of this case;

[ ] C. Upon a (finding/verdict) of not guilty, a judgement of acquittal is entered and the defendant is ordered discharged from all further proceedings in this case;

[X] D. Post-trial motions set for hearing on April 15, 19 83 at 11:30 A.M./P.M.;

[ ] E. This matter is referred to the Adult Probation Office of Peoria County for a pre-sentence investigation and report and if post-trial motions are filed and denied, or not filed, sentencing hearing is set for said motions date and hour;

[ ] F. Other: _____

Entered: 3/4, 1983.

Richard E. Eagleton
Judge of the Tenth Judicial Circuit

BEST AVAILABLE COPY

IN THE CIRCUIT COURT OF
THE TENTH JUDICIAL CIRCUIT OF ILLINOIS
PEORIA COUNTY

Case No. 82 CF 4394

PEOPLE OF THE STATE OF ILLINOIS
Plaintiff

v.

TERRY B. ALLEN
Defendant

MOTION TO VACATE

Defendant, for a Motion to Vacate, states:

All statements of the Defendant made to the two testifying psychiatrists should have been inadmissible as evidence because the People failed to prove their voluntary nature after Defendant objected to their admission.

Hand delivered 3/22/83—2:00 p.m.

/s/K.W. TILTON
ATTORNEY FOR DEFENDANT

STATE OF ILLINOIS, PEORIA COUNTY
IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT

FILE STAMP

FILED
1983

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

vs.

Defendant.

CASE No. 82CF 4394

~~ARRAIGNMENT~~ ORDER

Jerry B. Allen

JUDGE J Eagleton	COURT REPORTER Bortz	PLTF ATTY: Palusha	✓
DATE: 3-22-83 COURTROOM B	CLERK Jos	ATTY: DEFT Tilton PD (CHECK IF PRESENT)	✓

The Defendant having been called into Open Court on this date, and:

- ☐ 1. Defendant is present and is informed of the charge in the _____ and furnished with a copy thereof;
- ☐ 2. The Defendant desires Court appointed counsel and the Court determines the Defendant is indigent;
- ☐ 3. The Defendant requests additional time for private counsel to appear;
- ☐ 4. Counsel identified above appears for the Defendant;
- ☐ 5. The Defendant waives the reading or explanation of the charge;
- ☐ 6. The Defendant moves that the People furnish Discovery pursuant to Illinois Supreme Court rules;
- ☐ 7. The Defendant enters a plea of Not Guilty to each count of the charge;
- ☐ 8. The People move that the Defendant furnish Discovery pursuant to Illinois Supreme Court rules;
- ☐ 9. The Defendant waives a Jury Trial and requests a Bench Trial after admonition;
- ☒ 10. The People/Defendant move(s) for a continuance;
- ☒ 11. Other People move to continue trial setting; People move for reduction on trial of criminal charge

IT IS HEREBY ORDERED THAT: Δ bond on Criminal charge to P.R. and in alternative that Δ be released without bail on criminal charge

- ☐ A. The Public Defender is/is not appointed for the Defendant;
- ☐ B. This matter is continued on Defendant's motion to _____ ,19 _____ , at _____ A.M. P.M.
- ☒ C. This matter is continued on State's motion to May 9 ,19 83 , at 9:15 A.M. ~~P.M.~~
- ☐ D. This matter is continued by agreement to _____ ,19 _____ , at _____ A.M. P.M.
- ☐ E. The People are to furnish Discovery pursuant to Supreme Court Rules by _____, 19 _____.
- ☐ F. The Defendant is to file all motions preliminary to a plea by _____;
- ☒ G. The hearing on motions filed ~~and to plead the charge~~ is set for April 15, 1983 at 11:30 A.M. ~~P.M.~~
- ☐ H. The Defendant is to furnish Discovery pursuant to Supreme Court Rules by _____, 19 _____.
- ☒ I. The Scheduling Conference is set for April 28 ,19 83 , at 1:15 ~~A.M.~~ P.M.
- ☒ J. The Jury/~~Bench~~ Trial is set for May 9 ,19 83 , at 9:15 A.M. ~~P.M.~~
- ☒ K. Other Director of Corrections is hereby appointed guardian of the person of the Defendant. Defendant remanded to custody of Sheriff of Peoria. Δ ordered held pending hearing on motions set for April 15, 1983, but released without bail on criminal charges

ENTERED: 3/22/83

Richard E Eagleton
JUDGE OF THE TENTH JUDICIAL CIRCUIT

BEST AVAILABLE COPY

IN THE CIRCUIT COURT OF
THE TENTH JUDICIAL CIRCUIT OF ILLINOIS
PEORIA COUNTY

Case No. 82 CF 4394

PEOPLE OF THE STATE OF ILLINOIS
Plaintiff,

v.

TERRY ALLEN,
Defendant

SUPPLEMENTAL MOTION TO VACATE

1. The State failed to prove the Defendant sexually dangerous beyond a reasonable doubt.

2. This Defendant further moves for a Motion to Vacate for any and all other errors which may be determined by an examination of the transcript of proceedings herein, which transcript is not available to this Defendant at the time this motion was filed.

3. The State's two psychiatric witnesses, Dr. Mortimer D. Beck, M.D. and Dr. Bradford E. Colen, M.D., should not have been permitted to testify as to their conclusions regarding TERRY B. ALLEN'S condition as a result of the State's failure to prove that TERRY B. ALLEN'S statements made to them were voluntary.

Defendant was in custody on November 11, 1982 when he made statements to Dr. Colen, and on November 12, 1982 when he made statements to Dr. Beck. These statements were in the nature of admissions and confessions to certain acts and predispositions of Defendant and forming the basis for the allegations of the People's petition. Both the doctors and the State

have previously agreed that but for the statements of Defendant the doctors could not have reached their conclusions.

At the bench trial, prior to and during the testimony of the two doctors, Defendant repeatedly objected to the admission of the testimony of the two doctors on the ground that Allen's statements were involuntary and that he had not been given his *Miranda* rights by the doctors.

The Illinois Supreme Court held in 1957 that in proceedings under the Sexually Dangerous Person's Act the admission of statements, which are in the nature of a confession, required preliminary proof of their voluntary character. *People* v. *Capoldi*, 10 Ill.2d 261, 139 N.E.2d 776 (1957). Defendant demanded that the State do this at trial and the State said it wasn't necessary and the Court agreed.

The Supreme Court has also held that the Defendant may even refuse to answer incriminating questions. *People* v. *English*, 31 Ill.2d 301, 201 N.E.2d 455 (1964).

Although another Public Defender had been appointed prior to the examination herein, there is still a separate constitutional privilege against self-incrimination. *People* v. *Potter*, 85 Ill.App.2d 151, 228 N.E.2d 238 (1967). In this trial the Court permitted the People to resist meeting their burden of proof that such a privilege had been waived.

Consistent with *Miranda*, the privilege does not apply unless the Defendant is in custody. *People* v. *Pettit*, 423 N.E.2d 513 (1981). In this case there is no doubt that the Defendant was in custody.

However, a recent Appellate Court decision has held that even in an involuntary admission case, if the examining physician has not informed the patient of his right not to testify, that that physician will not be permitted to testify as to the patient's admissions at any subsequent Court hearing. *People* v. *Collins*, 429 N.E.2d 531 (1981).

The facts and the law are clear. The Court's judgment must be vacated.

/s/Kevin William Tilton
KEVIN WILLIAM TILTON
Attorney for Defendant
KEVIN WILLIAM TILTON
PROFESSIONAL CORPORATION
617 W. Garfield Avenue
Bartonville, Illinois 61607
(309) 697-5175

(Proof of service omitted in printing)

IN THE CIRCUIT COURT OF
THE TENTH JUDICIAL CIRCUIT OF ILLINOIS
PEORIA COUNTY
TRIAL DIVISION

Case No. 82 CF 4394

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiffs,

v.

TERRY ALLEN,

Defendant.

MEMORANDUM IN RESPONSE TO DEFENDANT'S SUPPLEMENTAL MOTION TO VACATE

Now comes the People of the State of Illinois by John A. Barra, State's Attorney of Peoria County and by Larry G. Paluska, Assistant State's Attorney, and in response to defendant's Supplemental Motion to Vacate state as follows:

The Sexually Dangerous Persons Act, (Illinois Revised Statutes, Chapter 38, Paragraphs 105-1.01 to 105-12, hereinafter "The Act"), requires treatment for this defendant, not punishment for a crime. The defendant is afforded some, but not all of the safeguards present in a criminal prosecution. *People* v. *English*, 31 Ill. 2d. 301, 201 N.E.2d. 455 (1964), (attached hereto as an exhibit).

For example, in *People* v. *Capoldi*, 10 Ill.2d. 261, 139 N.E.2d. 776 (1957), it was held that when proceeding under The Act, preliminary proof of voluntariness was required before the admission into evidence of two signed confessions in the form of answers by the defendant and questions asked of the defendant by the police, while in the custody of police. No

such evidence was offered in this case, where the victim testified concerning the criminal acts of the defendant.

Incriminating statements to psychiatrists cannot be excluded here based on involuntariness because the defendant can be compelled to submit to the psychiatric examinations. And while the defendant cannot be compelled to incriminate himself, that privilege applies only to testimonial compulsion, and the defendant can be compelled to submit to examinations which are not testimonial in nature. *People* v. *English*, 31 Ill.2d. 301, 201 N.E.2d. 455 (1964).

The defendant in this case, represented by court-appointed counsel since October 13, 1982, chose not to exercise any privilege when examined by the psychiatrists.

It is the People's recollection that the defendant made no Motion to Suppress as evidence any confession given by him on the ground that it was involuntary. When the defendant fails to object to the introduction into evidence of a confession or admission on grounds of voluntariness, its reception into evidence is proper. *People* v. *Hicks*, 44 Ill.2d. 550, 256 N.E.2d. 823, cert. den. 400 U.S. 845, 27 L.Ed.2d 81, 91 S.Ct. 90 (1970).

The defendant failed to comply with 38 Ill. Rev. Stat. 114-11 which states in part that such a Motion shall be in writing, made before trial, and state facts showing wherein the confession was involuntary. Pursuant to 114-11(c) the Court shall conduct a hearing if the Motion states facts which, if true, show that the confession was not voluntarily made. The defendant, in his oral Motion, likewise failed to state such facts.

By failing to make a timely, written Motion which complied with the requirements of Section 114-11, the defendant has waived any issue concerning the suppression of evidence of his admissions and confessions.

The record clearly shows that the statements to doctors were voluntarily and understandingly made, and there is no plausible argument to the contrary. Both doctors testified and were subject to cross-examination. In *People* v. *Thorpe*, 52 Ill.App.3d. 576, 367 N.E.2d. 960 (1977), the Court held that

even if defense counsel had not stipulated to the admission of statements voluntarily made by the defendant after arrest, they would have been admissible at the hearing under the Sexually Dangerous Persons Act, because the officer who took the statements testified at the hearing and the defendant had the opportunity to cross-examine.

Doctor Beck testified that prior to interviewing the defendant, he had informed the defendant of the purpose of their interview and that anything the defendant told him could be used in the report which would be submitted to the Court and the respective attorneys. The defendant willingly talked with both doctors, and the testimony of either doctor is sufficient to establish a *prima facie* case in the absence of contradictory reports. *People* v. *Olmstead*, 32 Ill.2d. 306, 205 N.E.2d. 625 (1965). There is no contradictory evidence in this case.

Even if a separate hearing were required, the failure to conduct same is harmless error. Doctor Beck's warnings to the defendant as well as the record when read as a whole indicate the defendant knowingly, voluntarily participated in the interviews. The defendant fails to allege or show how he is prejudiced by the absence of a separate hearing where similar evidence would be elicited to establish voluntariness. At no time while this case was pending did the defendant request that he or any other witness be permitted to testify to any circumstances reflecting upon the voluntariness of his statements.

The defendant cites *People* v. *Potter*, 85 Ill.App.2d. 151, 228 N.E.2d. 238 (1967) for the proposition that the defendant has a constitutional right against self-incrimination. In *Potter*, the defendant was arrested, interrogated by the police, and examined by psychiatrists, all before the defendant was appointed an attorney.

The defendant cites *People* v. *Pettit*, 97 Ill.App.3d. 692, 423, N.E.2d. 513 (1981) for the proposition that *Miranda* applies only if the defendant is in custody, and the people agree that there is no question that the defendant here was in custody.

But a careful reading of the case emphasizes why *Miranda* in inapplicable here. The Court states at 698, "however, the failure to administer, *Miranda* warnings will only render a statement inadmissible when it was the result of custodial interrogation by law enforcement officials," and on page 699, citing the landmark case, "The definition of custodial interrogation as prescribed in *Miranda* is 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' (*Miranda* v. *Arizona*, (1966) 384 U.S. 436, 444 16 L.Ed.2d. 694, 706 S.Ct.1602, 1612)."

Furthermore, statements not induced by the police and confessions or admissions made by the defendant in response to interrogation by private citizens are admissible in evidence without Miranda warnings having been given. *People* v. *Hawkins*, 53 Ill.2d.181, 290 N.E.2d. 231 (1972).

In our case, the defendant complains of statements made not to law enforcement officials, but to psychiatrists who, on November 5, 1982 in the presence of the defendant and his Court-appointed attorney, were ordered by the Court to examine the defendant.

In re Collins, 102 Ill.App.3d. 138, 429 N.E.2d. 531 (1981), (cited by defendant as *People* v. *Collins*, 429 N.E.2d. 531 (1981), involved the reversing of an Order finding the respondent subject to involuntary admission to the Department of Mental Health because mandates of the Mental Health and Developmental Disabilities Code (Ill.Rev.Stats. 1979, Ch. 91½, Para. 3-208) were not complied with, and that case is totally inapplicable to the instant case.

The People agree with the defendant that the facts and the law are clear.

Respectfully submitted,

/s/LARRY G. PALUSKA
Larry G. Haluska
Assistant States Attorney
Peoria County, Illinois

STATE OF ILLINOIS, PEORIA COUNTY
IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

vs.

Defendant.

CASE No. 82 CF 4394

FILE STAMP

FILED

MAY 3 1983

LEO E. SULLIVAN
Clerk of The Circuit Court
Peoria County, Illinois

[redacted] ORDER

JUDGE Jerry B. Alley / Eagleton	COURT REPORTER Sykta	PLTF ATTY: Galusha	✓
DATE: 5-3-83 COURTROOM B	CLERK Jones	ATTY: DEFT Lilton PD (CHECK IF PRESENT)	✓

The Defendant having been called into Open Court on this date, and:

☒ 1. Defendant is present ~~and is informed of the charge in the ____ and furnished with a copy thereof~~;

☐ 2. The Defendant desires Court appointed counsel and the Court determines the Defendant is indigent;

☐ 3. The Defendant requests additional time for private counsel to appear;

☒ 4. Counsel identified above appears for the Defendant;

☐ 5. The Defendant waives the reading or explanation of the charge;

☐ 6. The Defendant moves that the People furnish Discovery pursuant to Illinois Supreme Court rules;

☐ 7. The Defendant enters a plea of Not Guilty to each count of the charge;

☐ 8. The People move that the Defendant furnish Discovery pursuant to Illinois Supreme Court rules;

☐ 9. The Defendant waives a Jury Trial and requests a Bench Trial after admonition;

☐ 10. The People/Defendant move(s) for a continuance;

☒ 11. Other Matter having come on for a ruling on defendant's motion to vacate
IT IS HEREBY ORDERED THAT: Δ moves for appeal bond and stay.

☐ A. The Public Defender is/is not appointed for the Defendant;

☐ B. This matter is continued on Defendant's motion to _____, 19 _____, at _____ A.M. P.M.

☐ C. This matter is continued on State's motion to _____, 19 _____, at _____ A.M. P.M.

☐ D. This matter is continued by agreement to _____, 19 _____, at _____ A.M. P.M.

☐ E. The People are to furnish Discovery pursuant to Supreme Court Rules by _____, 19 _____.

☐ F. The Defendant is to file all motions preliminary to a plea by _____;

☐ G. The hearing on motions filed and to plead the charge is set for _____ at _____ A.M. P.M.

☐ H. The Defendant is to furnish Discovery pursuant to Supreme Court Rules by _____, 19 _____.

☐ I. The Scheduling Conference is set for _____ at _____ A.M. P.M.

~~☐ J. The Jury/Bench Trial is set for~~ Motion for a stay without bond is denied. Trial setting is cancelled.
_____, 19 _____, at _____ A.M. P.M.

☒ K. Other After hearing Motion to Vacate is denied and defendant is ordered remanded to the custody of Sheriff for transportation to defendant's guardian, the director of corrections, Dept. of corrections pursuant to this courts orders of March 4, and March 22, 1983. The Clerk ordered to file a notice of appeal; Appeal bond is set at $10,000 - no additional condition that defendant makes appeal bond to present a Mental Health treatment plan to court before release
ENTERED: _____
JUDGE OF THE TENTH JUDICIAL CIRCUIT
5/3/83
appellate defender is appointed & free transcript ordered
appeal bond set $10,000 - cash 10% does not apply

WHITE - CLERK'S COPY YELLOW - STATE'S COPY PINK - DEFENDANT'S COPY GOLD - SHERIFF'S COPY

Form U-14 (Rev. 5/81)

BEST AVAILABLE COPY

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FROM THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT PEORIA COUNTY

Case No. 82 CF 4394

PEOPLE OF THE STATE OF ILLINOIS
Plaintiff-Appellee,

v.

TERRY B. ALLEN
Defendant-Appellant.

NOTICE OF APPEAL

1. This appeal is being taken from the Trial Order of March 4, 1983, finding the Defendant to be a sexually dangerous person and the Order of May 3, 1983, denying the Motion to Vacate.

2. By this appeal, the Defendant-Appellant will ask the Appellate Court to reverse the Trial Order and enter Judgment on behalf of the Defendant-Appellant as matter of law, or such other relief as the Defendant-Appellant may be entitled to on this appeal.

/s/KEVIN W. TILTON
KEVIN WILLIAM TILTON
Trial Counsel for
Defendant-Appellant

Appellant's Attorney on Appeal
Robert Agostinelli
Deputy Defender, Office of the
State Appellate Defender
Third Judicial District
628 Columbus Street, Suite 308
Ottawa, Illinois 61350
(815) 434-5531

APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

No. 3-83-0342.
123 Ill.App.3d 669
78 Ill.Dec. 957

The People of the State of Illinois,
Plaintiff-Appellee,

v.

TERRY B. ALLEN
Defendant-Appellant.

April 16, 1984.

STOUDER, Presiding Justice.

On October 14, 1982, defendant, Terry Allen, was charged in the circuit court of Peoria County by information with the unlawful restraint and deviate sexual assault of Christine Ray, pursuant to Sections 11-3 and 10-3 of the Illinois Criminal code. (Ill. Rev.Stat.1981, Ch. 38, Pars, 11-3 and 10-3). On November 5, 1982, the State petitioned to have Allen declared a sexually dangerous person under Article 105 of the Criminal Code (Ill.Rev.Stat.1981, Ch. 38, Article 105). Two psychiatrists were appointed and order to examine and evaluate the defendant. After a probable cause hearing, the criminal charges were dropped. Defendant was then recharged by indictment, the petition to declare defendant a sexually dangerous person was reinstated and defendant waived his right to a jury.

The cause proceeded to a bench trial on March 4, 1983. Both court appointed psychiatrists testified as well as the alleged victim, Christine Ray. The defense presented no evidence. The court found that the State had proven defendant a sexually dangerous person. We do not agree that the defendant could

have been proven sexually dangerous beyond a reasonable doubt based upon the evidence.

The applicable statutory provision, Section 105.1.01, defines sexually dangerous person as

> "All persons suffering from a mental disorder, which mental disorder has existed for a period of not less than one year, immediately prior to the filing of the petition * * * , coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault * * * are hereby declared sexually dangerous persons."

These three elements, 1), the one year provision; 2), a propensity to commit sexual offenses and 3), demonstrated propensities toward acts of sexual assault, must all be proven beyond a reasonable doubt. *People* v. *Pembrock*, (1974), 23 Ill.App.3d 991, 320 N.E.2d 470. In this case the psychiatric testimony of the court appointed psychiatrists, Drs. Colen and Beck, must have been relied upon by the court to establish all of these elements of the offense because Christine Ray's testimony pertains to only one incident of sexual assault which occurred only a few weeks previous to the filing of the petition and the defendant had no previous convictions. Therefore, the psychiatric testimony must have been used by the trial court to establish that the defendant had had a mental disorder for one year previous to filing the petition, that defendant had a propensity to commit sex offenses and to demonstrate the defendant's propensity toward acts of sexual assault. This psychiatric testimony was based solely upon statements made by the defendant and therefore the State made its entire case from the defendant's unwarned statements. This was clearly a violation of defendant's constitutional right not to be forced to incriminate himself.

Although a procedure under the Sexually Dangerous Persons Act is said to be civil in nature, criminal safeguards apply to the Act because implementation of the Act can result in a substantial deprivation of the defendant's liberty. *United States ex rel. Stachulak* v. *Coughlin*, 520 F.2d 931 (7th Cir.

1975). Specifically, the right against self-incrimination applies, *People* v. *Capoldi* (1957), 10 Ill.2d 261, 139 N.E.2d 776, and a defendant cannot be forced to make incriminating statements to a psychiatrist during a compulsory examination mandated by the statute. *People* v. *English* (1964), 31 Ill.2d 301, 201 N.E.2d 455. The U.S. Supreme Court went even further in *Estelle* v. *Smith* (1981), 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359, in applying the privilege against self-incrimination to compulsory psychiatric examination which was later used to establish the defendant's dangerousness by requiring *Miranda*-type warnings be given and counsel be offered previous to the compulsory examination. We find *Estelle* v. *Smith* directly applicable to the compulsory psychiatric examinations to which this defendant was subjected and which the trial court must have relied upon to establish all three elements which the statute required be satisfied in order to find the defendant a sexually dangerous person. The record clearly shows that defense counsel objected to the admission of the psychiatrists' testimony on the grounds that the defendant must not be forced to incriminate himself. Dr. Colen never warned the defendant that anything he said might later be used to find him sexually dangerous nor did Dr. Beck give an adequate warning. Therefore, the trial court could not rely solely upon the defendant's unwarned statements to the psychiatrists to find the defendant a sexually dangerous person.

We have not lost sight of the fact that Christine Ray, a victim of an alleged assault, testified in this proceeding. However, her testimony even if sufficient to establish one act, it pertained to only one act which was not adequate to satisfy the multiple acts requirement of the third element of the statutory definition. Also, no prior convictions were admitted in this case.

For the above reasons we reverse the decision of the circuit court of Peoria County.

Reversed.

ALLOY, J., concurs.

HEIPLE, J., dissents.

HEIPLE, Justice, dissenting:

Pursuant to section 4 of the Sexually Dangerous Persons Act, (Ill.Rev.Stat.1981, ch. 38, par. 105-4) (hereinafter Act), the defendant was ordered to undergo psychiatric examinations to determine whether he was sexually dangerous. Two psychiatrists testified based on their examinations, the defendant was mentally ill and exhibited propensities to commit sex crimes. The majority finds that this testimony was inadmissible because the defendant was not given *Miranda* warnings before the examinations in violation of his fifth amendment rights. I dissent.

The majority opinion proceeds from the erroneous premise that the defendant was compelled to incriminate himself because his statements to the psychiatrists were used to show that he was a sexually dangerous person. Not so. Proceedings under the Act are civil in nature. (Ill.Rev.Stat.1981, ch. 38, par. 105-3.01.) Therefore, a defendant's statements are incriminating only if they expose the defendant to actual criminal prosecution as opposed to a determination of his civil mental status under the Act.

In *People* v. *English* (1964), 31 Ill.2d 301, 307, 201 N.E.2d 455, the Illinois Supreme Court held that a defendant can be compelled to answer questions during a psychiatric examination under the Act so long as he is not forced to make incriminating statements:

> "We hold that the privilege against self-incrimination protects defendant from making any statements to the psychiatrists which may tend to incriminate him. *This does not mean, however, that defendant is privileged from submitting to any examination.* In *People* v. *Greer*, 28 Ill.2d 107, 190 N.E.2d 742, and *People* v. *Munziato*, 24 Ill.2d 432, 182 N.E.2d 199, we held that the privilege protects only against testimonial compulsion. Thus, defendant can be compelled to submit [to] those parts of the examination which do not call upon his testimonial capacity, even though some of the information obtained may be incriminating; and he can, of course, be compelled to make

> replies as long as the questions do not require an answer which may tend to incriminate him." (Emphasis added.)

According to *English*, a defendant's privilege against self-incrimination does not extend to a disclosure of his mental condition unless it would also reveal criminal conduct independent of the defendant's status under the Act. The majority has departed from this rule by defining an incriminating statement as anything which is used to support a finding of sexual dangerousness. If this definition is followed, then a defendant may refuse to answer all questions during an examination on fifth amendment grounds. This is clearly contrary to *People* v. *English*.

United States ex. rel. Stachulak v. *Coughlin* (7th Cir. 1975), 520 F.2d 931, does not support the majority's position. In *Coughlin*, the court held that in proceedings under the Act, the State must prove its case beyond a reasonable doubt. Although this requirement has been incorporated into the Act, proceedings thereunder remain civil in nature. (Ill.Rev.Stat.1981, ch. 38, par. 105-3.01.)

Coughlin also held that the privilege against self-incrimination applied to the Act but did not discuss the issue in depth. Instead, the court cited with approval *People* v. *English* which the majority has now rendered obsolete.

Likewise, *Estelle* v. *Smith* (1981), 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359, provides no authority for suppressing all unwarned statements made during a psychiatric examination under the Act. *Estelle* addressed the issue of a defendant's fifth amendment rights during a compulsory psychiatric examination prior to a death penalty hearing which is a criminal proceeding. *Estelle* should not be employed as a precedent in civil matters such as the present case.

In my opinion, the lack of *Miranda*-type warnings prior to the defendant's examinations should not render incriminating statements inadmissible in this proceeding. Such incriminating statements made by the defendant should be held inadmissible only in subsequent criminal prosecutions. I am aware that in

People v. *Potter* (1967), 85 Ill.App.2d 151, 228 N.E.2d 238, the court held that such statements would be inadmissible both under the Act and in a subsequent criminal prosecution. However, I would decline to follow *Potter* insofar as it purports to bar use of the unwarned statements in a proceeding under the Act.

Indeed, in the present case, there is no indication that the defendant made incriminating statements which exposed him to potential criminal prosecution. Therefore, the lack of warnings does not render the psychiatrist's testimony inadmissible. I would affirm the circuit court's judgment finding the defendant to be a sexually dangerous person.

No. 60184

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellant,

v.

TERRY B. ALLEN,
Defendant-Appellee.

Appeal from the Appellate Court of Illinois, Third Judicial District, No. 3-83-0342

There heard on Appeal from the Circuit Court of the Tenth Judicial Circuit, Peoria County, Illinois, No. 82-CF-4394

MOTION FOR LEAVE TO SUPPLEMENT THE RECORD

Now come the People of the State of Illinois, through their attorney, NEIL F. HARTIGAN, Attorney General of the State of Illinois, pursuant to Rule 329 of the Rules of this Court to seek leave of this court to supplement the record on appeal with the certified reports of Howard Marcum (two reports), Bradford Colen and Mortimer Beck. All of these reports were filed by defendant in the Third District Appellate Court in support of defendant's motion for release on bond and are needed to decide defendant's present bond motion pending in this Court. Moreover, two of these reports were ordered by the Peoria County Circuit Court Judge and were filed with that court pursuant to statutory requirement. The authors of those

reports testified to the contents of the reports, and these documents were relied upon by the circuit court judge to reach the finding now challenged on appeal. Finally, the reports were appended to the petition for leave to appeal in this Court. Because these documents are needed to present the issue on appeal in a full and fair manner, the People of the State of Illinois respectfully seek leave to supplement to the extent that these documents are not already part of the record on appeal.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General
State of Illinois

BY: /s/Sally L. Dilgart

SALLY L. DILGART
Assistant Attorney General
188 West Randolph Street
Suite 2200
Chicago, Illinois 60601
(312) 793-2570

STATE OF ILLINOIS
SUPREME COURT CLERK
SUPREME COURT BUILDING
SPRINGFIELD 62706
December 3, 1984

JULEANN HORNYAK
CLERK OF THE COURT
(217) 782-2035

State Appellate Defender
628 Columbus Street
Ottawa, IL 61350

ATTN: JEAN HERIGODT

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 60184 - People State of Illinois, appellant, v. Terry B. Allen, appellee.

Motion by appellant for leave to supplement record on appeal. Motion *allowed*.

Motion by appellee for leave to respond to motion by appellant for an extension of time for filing brief and to order his release under Rule 604(a)(3), or, in the alternative to reduce or modify bond. Motion *denied*.

JH:th
cc: AG - Criminal
SAASC - Ottawa, IL (John X Breslin)
SA - Peoria Co.

BRADFORD E. COLEN, M.D., S.C.
MAC BRADLEY, PH.D., P.C.
SUITE 301, GLEN OAK MEDICAL PLAZA
120 N.E. GLEN OAK, PEORIA, ILLINOIS 61603
TELEPHONE: 637-4266

November 11, 1982

Mr. Donald J. Toohill
Assistant State's Attorney
Peoria County Courthouse
Peoria, IL 61602

RE: Mr. Terry B. Allen
Case No. 82 CF 4394

Dear Mr. Toohill:

I interviewed Mr. Terry Allen in my office on Thursday, November 11, 1982, for an extended psychiatric evaluation with reference to the question of whether or not he is a sexually dangerous person.

Mr. Allen is a 23 year-old, bearded, tall, white male who was brought to the interview by a deputy. He came from the Peoria County Jail. He appeared unkempt, his beard untrimmed, and he was somewhat distracted, confused and vague throughout the interview. He tended to answer my questions with answers, but did not volunteer any spontaneous information. Throughout the interview, he rubbed his eyes with his fingers as if he was pained having to go through the details of the story, and yet at other times, I experienced him as playing with me as someone might feign difficulty and then hide behind their hand, and look to see how you were buying their story.

He related the events surrounding the charge as follows:

He indicates that he has been charged with sexually deviant assault, and indicates that on October 13, 1982, he talked with a girl named Chris at McDonalds. He indicates that he had known her for three days prior to this because she worked there and he was a customer. He indicates that one night she

came out and started talking with him, and he asked her if she wanted to take a drive. He indicated that she had later said that he was in the back seat with a knife, and he denied this. The assumption from him was that she agreed to drive to the airport, but then he did indicate that once they had gotten to the airport, he had her commit an act of oral sex upon him. He would not describe what it was, and I had to ask him what the sexual act was. He indicated that "it was against her will, I couldn't control myself. I need help". He indicated "I have done this before, and I need help". He indicated to me that a number of times he had forced girls to perform oral sex upon him, the first time beginning at the age of 10. He indicates that in none of these times has he ever been prosecuted.

Past history:

He states he was born and reared in Peoria, Illinois. He states that his family consisted of his mother and father, four brothers and a sister. He is the fourth of six in the sibline. He indicates that his father died when he was 10 years old from alcoholism. Incidently, it is at this same age of 10 that he started his sexually dangerous acts, forcing women to perform oral sex. He indicated that he attended Von Steuben school and was in special education and attended one year of Woodruff High School in 1974, and then dropped out because of fights. He was also in special education. He indicates holding a number of odd jobs between 1975 and 1979, at which time he went into the service. He also indicated that during this period of time he lived at home with his mother. From 1979 to 1980, he was in the army and then was given military discharge because "I was doing things the sergeant couldn't understand". He indicates that between the discharge from the service in 1980 and the current time, he has not been employed and has been living with his mother. However, he did indicate that in January through March of 1981, he was hospitalized at Danville V.A. hospital and followed briefly by Dr. Pinto here at the Peoria V.A. clinic. He indicates that during that period of time he was on Mellaril, an anti-psychotic medication, and that "this helped me some". He denied other medical problems other than at

times having some stomach pain. He indicates he smokes heavily, drinks only rarely, and was not drinking on the day of the alleged offense, and has taken drugs in the past (marijuana and heroin—snorted heroin, never taken I.V.)

Mental status examination:

He spoke by answering questions but did not volunteer any information. He had primarily followable logic and associations. However, at times, his mind tended to wander. He did report to auditory hallucinations or "voices" telling him "kill yourself" since he has been jailed. He reports the voices in the past saying "They cursed me out". It is unclear to me from the interview whether or not he is in fact hallucinating. I would think it would be very important to obtain the hospital records from the Danville V.A. hospital where somebody has had a chance to evaluate him over a two to three month period of time to assess more clearly the question of the degree or actuality of psychosis. He denied delusions. His affect he reported being depressed and described both sleep and appetite disturbance. He described thoughts about ending his life, indicating "if they would give me a sheet, I would hang myself". However, in the next breath, he indicated that he wanted to be hospitalized to get help. It was hard for me to understand him saying in one breath "I don't want to go on, I'd like to end my life" and then in the next breath indicating that he wanted hospitalization and wanted help. I asked him the date today, and he was able to give me the day and month, and then had a hard time recalling the year, even though a sentence prior to that he had been able to tell me that it was January through March of 1981, the year preceding this year when he had been hospitalized. Again this is unclear to me how much this is him attempting to not be clear, or he was just unable to be clear. He was unable to remember three out of three objects after five minutes. He did not understand the proverb about "not crying over spilt milk".

Discussion:

Mr. Allen is a 23 year-old, white, single male with a long-standing history of problems with being in special education

classes, getting into fights, and therefore dropping out of school. He also reported having a "problem that a sergeant couldn't understand" in the service and therefore being discharged early. He reports to psychotic symptoms of audidtory hallucinations. He also reports to being very close to his father, who died when Me. Allen was 10, the age at which these acts began. One can't but imagine that Mr. Allen is in fact someone who might be attempting to make up for the loss of his father by these sexually dangerous acts. He also has abused drugs and alcohol in the past.

One of the major questions in my mind is whether or not Mr. Allen is psychotic or schizophrenic. I have a very difficult time making this determination, and I think it would be very important to obtain the hospital records from the Danville V.A. hospital where someone has had a chance to examine him over a several month period of time to make this assessment more accurately. Also, currently I see him as being depressed and of possible suicidal threat, and that he would need to be watched while he is in jail.

My conclusion is that he is in fact a sexually dangerous person, having committed sexual acts and having suffered from a mental disorder as indicated by the history of at least over one year's duration. I would also feel currently it would be very important that this man's records be reviewed and the possibility of hospitalization be initiated soon to help in terms of his depression, the possibility that he is psychotic and suicidal, and then to assess the question of what should be done with him to protect society.

Sincerely,

/s/ Bradford E. Colen, M.D.

BRADFORD E. COHEN, M.D.

BEC:lrs

MORTIMER D. BECK, M.D. & ASSOCIATES, LTD.
MORTIMER D. BECK, M.D.
4617 NORTH PROSPECT ROAD
PEORIA HEIGHTS, ILLINOIS 61614
TELEPHONE: 688-1023

THE HONORABLE C. BRETT BODE, JUDGE
THE TENTH JUDICIAL CIRCUIT COURT
PEORIA COUNTY COURTHOUSE
PEORIA, IL 61602

November 12th, 1982

RE: TERRY B. ALLEN
82 CF 4394

Dear Judge Bode:

Introduction: This letter is regarding the court ordered forensic psychiatric evaluation which I did on Terry Allen on November 12th, 1982 for a determination regarding his being found to be a sexually dangerous person.

Statement: It was explained that I was acting with the defendant only to do this forensic examination which would result in a letter to the court and the respective attorneys and that the defendant was not coming to the office for a doctor's visit or for any other reason. He then understood that anything that he would tell me in the interview could be used in the letter. I had available to me the police reports before the examination. No attempt has been made to confirm any of the defendant's statements so as to verify that the information that I have been given is true or not. The defendant wanted to be found sexually dangerous and did so because he felt that it was a better alternative than a trial trying to be found not guilty. I made sure that he understood what the consequences were and he had a reasonable understanding of what they were.

The Refferal: The request of this exam was made by court order at the urging of Assistant States Attorney Donald Toohill, who is the prosecuting attorney in this case. The defense attorney is Mrs. Susan Lucas.

Cooperation: The defendant was very cooperative. I have the definite impression that he is unreliable and that sometimes he is not telling the truth. He might also be suggestible.

Psychiatric Interview: The defendant is 23 years of age. His birth date is 1-3-59. He admitted to the incident alleged with some exceptions. He admitted he was in the car with Christine Ray. He said that she was about 21 years of age. He admits to having sexual intercourse with her and forcing her to have his penis in her mouth. He thinks that it is possible that he could have scared her and forced her more than he thought. He said that he forced a 10 year old girl to accept his penis in her mouth when he was himself ten. Since then he has forced women on at least ten occasions to do the same. Some of these women were black and some white. Apparently none of them filed police reports or he was at least not linked to any of these other sexual attacks. He denies home invasion. They all occurred on the street. He told me that he can not by himself "stop this stuff." The alleged incident happened on the 11th of October and he was arrested on the 13th of October.

He has not had a job except for manpower and short jobs like raking leaves. He lives with his mother and one brother. He was always fighting at school and could be considered as being violent. He was in trouble with the security guards at school. Finally, he left school (he was not expelled). He went into the Army and lasted less then 1 year. This was in 1979 and 1980. He received an administrative discharge but does not know why. The sargeant told him that he could not understand his behavior. He was AWOL one time while in the service. He has had two psychiatric hospitalizations. The first was at Zeller in 1975. He could not tell me why he was there. There were fights at Zeller and he hit someone on the head with a pool cue. When I asked why he said he could not control himself. The hospitalization lasted one month. He was hospitalized at the Danville VA hospital in 1982 (at first he said it was right after he got out of the service.) He was there for three months. He said that he was allergic to thorazine that he was given. It caused his skin to become red in the sun. At Zeller he was given mellaril

but he discontinued it because it made him woozy. Both of these medicines are used for the treatment of psychotic individuals. He has been in jail twice before, once for shop lifting and the second time for suspicion. (I had asked him prior to this question how he got along without any job or money. I asked if he stole and he denied it.) He said his basic illness has depressions and highs connected with it. He denied that he misused alcohol or illicit substances. There is a strong family history of emotional illness.

Past History

Physical Health:—Good

Allergies:—Thorazine sun reaction

Alcohol: He drinks now and then. He denies any drinking problem.

Drugs: He admits to occasional heroin and marijuana use.

Parents and Family: His father was from Louisiana and died when the defendant was 10 years of age. He died of pneumonia secondary to a long history of heavy drinking. His mother is from Illinois. She lives in Peoria and he lives with her and his younger brother. There were 5 boys and 1 girl in the family. Another sister died at birth. He was the middle boy. There is an uncle who has had some emotional problems.

School: He did not finish the ninth grade.

Legal: As above.

MENTAL STATUS EXAMINATION

Appearance and Behavior: His appearance seemed average and unremarkable. His behavior seemed to be the same. There was no problem of control or violence in the one hour he was here. His voice was sometimes hard to hear. It was not modulated well. This is something sometimes seen in chronically psychotic people.

Consciousness: He is conscious, alert and concentrating well. He is adequately oriented to time (11-10-82 Thursday). In my

experience this is close enough for someone in the jail one month. He seemed to recognize the place he was in to be a doctor's office.

Memory: Recent memory is good. Past memory is good as well.

Reading, Calculation and Information: He seemed to have a very defective fund of information as if he did not pay much attention to the real world. I did not test the other two.

Personality: Cold, impulsive, calculating with the feeling that "he" is not in control.

Abstract Thinking: He seemed to be operating in the abstract mode. He did not have a definite defect of abstract operations. He uses idiosyncratic thinking rarely.

Mood: Flat and cold. There was no remorse for these violent sexual acts. He committed these violent acts in both moods of depression and high moods.

Thourgh and Judgment; He did not appear to be delusional or overtly paranoid. There were no evidences of hallucinations. His judgment was defective for the acts he committed.

Qualified Psychiatrist: I am a repudable physician licensed in Illinois to practice medicine in all of its branches. I have specialized in the diagnosis and treatment of mental and nervous disorders for a period of about 18 years.

Findings: This is a man who seems to be suffering from an mental disorder. This disorder appears to be a chronic mild to moderate schizophrenic process. It is characterized by aggressive and abnormal behavior, emotional ups and downs, behavioral deterioration, poor judgment, lack of empathy for others, lack of insight into his own behavior. He lacks hallucinations and obvious delusions. Treatment might include major tranquilizers and lithium because of the affective component to this case. This illness has existed for a period of at least seven years immediately prior to the filing of this petition. He admits to and I find a criminal propensity to the commission of violent

sexual offenses. He has demonstrated the propensity towards acts of sexual assault.

Conclusion: My psychiatric conclusion is that he is a sexually dangerous person.

Thank you for the opportunity of seeing this defendant.

Sincerely,

MORTIMER D. BECK, M.D.
Private Practice Psychiatry

SUPREME COURT OF ILLINOIS

No. 60184

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellant,

v.

TERRY B. ALLEN,
Appellee.

July 17, 1985

THOMAS J. MORAN, Justice:

Defendant, Terry B. Allen, was charged by information in the circuit court of Peoria County with the crimes of unlawful restraint and deviate sexual assault. The State then filed a petition to have defendant declared a sexually dangerous person pursuant to article 105 of the Code of Criminal Procedure of 1963 (Ill.Rev.Stat.1981, ch. 38, par. 105-1.01 *et seq.*). While the sexually dangerous person petition (petition) was pending a preliminary hearing was held on the information, and the charges were dismissed for lack of probable cause. Defendant was then indicted and the petition reintstated.

Before trial on the indictment, a bench trial was held on the petition. The trial court found defendant to be a sexually dangerous person. After his post-trial motions were denied defendant appealed. The appellate court, with one dissent, reversed, holding that (1) the trial court had improperly relied upon testimony obtained in violation of defendant's privilege against self-incrimination, and (2) the State was required to prove multiple acts of sexual assault in order to show that defendant was a sexually dangerous person as defined in the statute. (123 Ill.App.3d 669, 78 Ill.Dec. 957, 463 N.E.2d 135.) We granted the State's petition for leave to appeal.

On appeal the State raises three issues, but two of these issues present the identical question. They can therefore be condensed as follows: (1) Are *Miranda* warnings required before a defendant may be examined by a psychiatrist pursuant to a court order in a sexually dangerous person proceeding? and (2) Did the defendant waive any privilege against self-incrimination which he may have had? The defendant, on cross-appeal, raises a third issue: Did the State prove beyond a reasonable doubt that the defendant was a sexually dangerous person as defined by statute?

Defendant was formally charged with unlawful restraint and deviate sexual assault. The State then filed the sexually dangerous person petition. With the defendant and defense counsel both present, the court ordered defendant to submit to two psychiatric examinations. No court reporter was present at this hearing, but the written order for the hearing states that the procedure and rights under the sexually dangerous persons statute were explained to the defendant and the defendant indicated that he understood the nature of the proceedings.

On March 4, 1983, the defendant was tried under the petition in a bench trial. The State presented three witnesses, but the defendant did not produce any evidence. The State's first witness was Dr. Bradford Colen, a psychiatrist who had interviewed defendant. Defendant objected to Dr. Colen's testimony, claiming that the doctor had elicited information from him in violation of his privilege against self-incrimination. Aside from some observations about the defendant's appearance and his apparent confusion and vagueness, Dr. Colen's testimony was based almost entirely upon defendant's statements and admissions made during the interview. The trial court ruled that defendant's statements to Dr. colen were not admissible into evidence, but allowed the doctor to give an opinion based upon his overall interview with defendant. His opinion was that defendant was mentally ill with criminal propensities to commit sex crimes.

The State's next witness was Dr. Mortimer Beck, another psychiatrist, who had examined defendant. The trial judge

again refused to allow into evidence the defendant's statements to the psychiatrist, but allowed Dr. Beck to express an opinion which was based "to a great extent" upon defendant's statements and admissions during his interview. Dr. Beck's opinion was that defendant was suffering from a mental disorder and had criminal propensities toward committing sexual assaults.

The State's final witness was Christine Ray, the victim of the alleged assault. Ray worked at a McDonald's restaurant in Peoria, and had noticed the defendant in the restaurant on October 11, 1982. She had spoken briefly to him while she was cleaning tables. After she got off work, at about 6 p.m., she sat down in a booth. Defendant came up and asked Ray if he could join her. She agreed, and the two talked for approximately 30 to 45 minutes. At some point in the conversation Ray described her automobile to defendant and mentioned the general location at which it was parked.

After ending the conversation Ray went into the restroom. When she emerged defendant was no longer in the restaurant. She went out to her automobile, where she discovered that she had left one of the doors unlocked. She got in, started the car, and pulled out of the parking lot. When she stopped at the first stop sign she noticed that defendant was in the back seat of her car.

At this point, Ray testified, defendant asked her to take him to "a romantic place." She asked him where to go and he replied "a romantic place—or else." His tone of voice, she testified, was "kind of threatening type."

At defendant's request, Ray drove to the airport. After reaching the airport she drove around the parking area a few times until defendant told her to pull into the parking lot. She pulled up to the parking gate and opened the door to reach for the parking ticket. As she reached for the ticket defendant reached over and grabbed her on the neck or shoulder. He let go, however, and she got back in the car. Defendant then climbed over into the front seat.

Ray parked the car, and defendant asked her to lift the steering wheel and put the seat back. After doing so, Ray

testified, defendant "grabbed me by the legs, set them up on the front seat." He then pulled her to a prone position and lay on top of her, simulating intercourse even though both were fully clothed.

Next, Ray testified, defendant took off his pants and asked her to take hers off also. She said no, whereupon "he reached for them, tugged them off a little bit. I finally decided to take them off." When asked by the prosecutor why she took off her pants Ray replied, "Due to the fact that he was going to get them off whatever way he wanted, anyhow."

Defendant again simulated intercourse, although Ray was still wearing panty-hose. After a short time he stopped, and asked Ray if she would perform fellatio on him. Ray said no, whereupon defendant insisted that she would. Ray asked if she could leave, to which defendant replied "after he was satisfied." Ray testified that she finally agreed to satisfy defendant if he would let her leave.

Ray then proceeded to manipulate defendant's penis manually. She testified that defendant pushed her head down, forcing her to perform fellatio. She tried to resist but because of an injury sustained in football while in school, was unable to do so.

Ray then again asked defendant if she could leave, and he agreed. With defendant still in the car she drove to the parking lot gate. Both of them exited the car, and Ray locked the car and entered the terminal to pay the parking fee. While in the terminal she told the woman who took her parking fee that a man had forced her to go to the airport, but Ray testified that she realized that the woman was not going to call airport security. She made no other attempt to summon help before returning to the car. She then gave defendant a ride to a trailer where he said a friend of his lived.

On redirect examination Ray testified that she had asked defendant several times if she could leave, and each time defendant told her that she could not leave until "he got what he

wanted." She did, however, admit that her fear of defendant was based in part upon her experiences with another man:

> "I had a fiancee and he had a drinking problem, and you went along with him, or you might have been dead, and I learned that if you halfway go along with a person to a point, that chances are you will get out of it okay, but it was a fifty-fifty chance, and I was hoping that this guy was, at least, partially like the guy that I had had all my experience with."

In *People* v. *English* (1964), 31 Ill.2d 301, 201 N.E.2d 455, this court held that sexually dangerous persons proceedings, while similar to criminal proceedings, were nonetheless essentially civil in nature. This was so even though the interests at stake mandated stricter procedural safeguards than in an ordinary civil proceeding:

> "Since the Sexually Dangerous Persons Act provides for involuntary confinement, although it be for the treatment of the defendant rather than punishment for a crime, it is natural that some of the same safeguards which are applicable in a criminal prosecution be applied to the proceedings under the act. This does not mean, however, that the commitment proceeding is a criminal prosecution or that criminal procedure as a whole must be followed in the proceeding." (31 Ill.2d 301, 304, 201 N.E.2d 455.)

See also *People* v. *Studdard* (1972), 51 Ill.2d 190, 196, 281 N.E.2d 678.

This aspect of *English* has not been affected by subsequent cases. Although the fact that incarceration may result is relevant to the question of whether or not the self-incrimination privilege applies (*In re Gault* (1967), 387 U.S. 1, 50, 87 S.Ct. 1428, 1455, 18 L.Ed.2d 527, 558-59), it is clear that "the fact that a proceeding will result in loss of liberty does not *ipso facto* mean that the proceeding is a 'criminal prosecution'." (*Middendorf* v. *Henry* (1976), 425 U.S. 25, 37, 96 S.Ct. 1281, 1289, 47 L.Ed.2d 556, 566.) In *Minnesota* v. *Murphy* (1984), 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409, the Supreme Court applied the principle in *Middendorf* to the privilege against self-incrimination. After holding that the revocation of proba-

tion was not a criminal proceeding, the court then ruled that a defendant cannot claim the privilege merely because his answer to a question might result in revocation of his probationary status. (465 U.S. 420, ____ ____ & n. 7, 104 S.Ct. 1136, 1146-47 & n. 7, 79 L.Ed.2d 409, 424-25 & n. 7.) However, a defendant may still refuse to answer questions if the answers could be used to implicate him in a separate criminal offense. 465 U.S. 420, ____ ____ & n. 7, 104 S.Ct. 1136, 1146-47 & n. 7, 79 L.Ed.2d 409, 424-25 & n. 7.

The holding that sexually dangerous persons proceedings are not criminal prosecutions was also not altered by *People* v. *Pembrock* (1976), 62 Ill.2d 317, 342 N.E.2d 28. In *Pembrock* this court ruled that because of the liberty interests at stake in a sexually dangerous person proceeding, due process required that the State prove the defendant's status beyond a reasonable doubt. (62 Ill.2d 317, 321, 342 N.E.2d 28.) This holding has since been incorporated into the statute. (Ill.Rev.Stat.1983, ch. 38, par. 105-3.01.) *English*, however, recognized that the liberty interest at stake in such a proceeding required strict procedural safeguards, but held that not all criminal procedural safeguards need be applied. (*People* v. *English* (1964), 31 Ill.2d 301, 304, 201 N.E.2d 455.) *Pembrock*, which requires only one particular procedural safeguard, is not inconsistent with *English*.

We see no reason now to disturb that part of *English* which held that a sexually dangerous person proceeding is not a criminal prosecution. A person found to be sexually dangerous is to receive "care and treatment * * * designed to effect recovery." (Ill.Rev.Stat.1983, ch. 38, par. 105-8.) Upon recovery the defendant is released from custody and the information or indictment which led to his commitment is quashed. (Ill.Rev.Stat.1983, ch. 38, par. 105-9.) Since treatment, not punishment, is the aim of the statute, the legislative determination that the proceedings are civil in nature (Ill.Rev.Stat.1983, ch. 38, par 105-3.01) is eminently reasonable. See *Addington* v. *Texas* (1979), 441 U.S. 418, 428, 99 S.Ct. 1804, 1810, 60 L.Ed.2d 323, 332; *Tippett* v. *State of*

Maryland (4th Cir.1971), 436 F.2d 1153, 1159, *cert. dismissed sub nom. Murel* v. *Baltimore City Criminal Court* (1972), 407 U.S. 355, 92 S.Ct. 2091, 32 L.Ed.2d 791; *French* v. *Blackburn* (M.D.N.C.1977), 428 F.Supp. 1351, 1359, *aff'd* (1979), 443 U.S. 901, 99 S.Ct. 3091, 61 L.Ed.2d 869; *Cramer* v. *Tyars*, (1979), 23 Cal.3d 131, 137-38, 588 P.2d 793, 796-97, 151 Cal.Rptr. 653, 656-57; *People* v. *Poggi* (1980), 107 Cal.App.3d 581, 586, 165 Cal.Rptr. 758, 760; *In re Beverly* (Fla.1977), 342 So.2d 481, 488-89; *Commonwealth* v. *Barboza* (1982), 387 Mass. 105, 111, 438, N.E.2d 1064, 1069, *cert. denied* (1982), 459 U.S. 1020, 103 S.Ct. 385, 74 L.Ed.2d 516; *In re Matthews* (1980), 46 Or.App. 757, 762, 613 P.2d 88, 91, *cert. denied* (1981), 450 U.S. 1040, 101 S.Ct. 1757, 68 L.Ed.2d 237; *Moss* v. *State* (Tex. Civ. App. 1976), 539 S.W.2d 936, 945-48.

The appellate court believed that *People* v. *Capoldi* (1957), 10 Ill.2d 261, 139 N.E.2d 776, applied to the privilege against self-incrimination to these proceedings. (123 Ill.App.3d 669, 671, 78 Ill.Dec. 957, 463 N.E.2d 135.) This interpretation is erroneous, especially since *English*, decided after *Capoldi*, specifically held that the privilege did not apply. *Capoldi* held only that the State must make a preliminary showing as to the voluntariness of admissions sought to be introduced in a sexually dangerous person proceeding. (10 Ill.2d 261, 268, 139 N.E.2d 776.) Voluntariness and the self-incrimination privilege are separate issues, however, and in this case the in-court warnings to defendant and the fact that he was represented by counsel convince us that the preliminary showing of voluntariness was indeed made. Had the defendant claimed that the statements to the psychiatrists were involuntary then *Capoldi* might entitle him to a preliminary hearing on the question (10 Ill.2d 261, 267-68, 139 N.E.2d 776), but since defendant does not claim that the statements were involuntary then *English*, and not *Capoldi*, applies.

The holding that the privilege against self-incrimination is not required in the proceedings in question is supported by the subsequent ruling in *Mathews* v. *Eldridge* (1976), 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18. *Eldridge* set out the factors relevant to the evaluation of a procedural due process claim:

> "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18, 33.

While the private interest involved in the instant proceeding is great, there are already numerous safeguards ensuring reliability, including the right to a jury trial (Ill.Rev.Stat.1983, ch. 38, par. 105-5), the requirement of proof beyond a reasonable doubt (Ill.Rev.Stat.1983, ch. 38, par. 105-3.01), and the right to confront witnesses (*People* v. *Nastasio* (1960), 19 Ill.2d 524, 168 N.E.2d 728). The privilege against self-incrimination would add little more reliability to the proceedings, especially since the privilege is not primarily concerned with reliability but is instead designed to check the power of the State over the individual. *In re Gault* (1967), 387 U.S. 1, 47, 87 S.Ct. 1428, 1454, 18 L.Ed.2d 527, 557.

Finally, the State has a substantial interest in treating as well as protecting the public from sexually dangerous persons, an interest which would be almost totally thwarted by a strict application of the self-incrimination privilege in such proceedings. If a defendant is allowed to refuse to answer questions asked during the psychiatric interview then it would be nearly impossible for the State to determine whether or not the defendant was sexually dangerous. Since the self-incrimination privilege would be a great burden to the State while being of minimal value in assuring reliability, the *Eldridge* test totally supports the holding in *English* that due process does not require the application of the privilege.

Since there is no privilege aginst self-incrimination in sexually dangerous person proceedings there is no need for *Miranda* warnings to be given. At this stage no criminal proceeding is involved. Therefore the appellate court's reliance upon *Estelle* v. *Smith* (1981), 451 U.S. 454, 101 S.Ct. 1866, 68

L.Ed.2d 359, is misplaced. In *Estelle* v. *Smith* the court held that *Miranda* warnings must be given when the defendant's statements to a court-appointed psychiatrist are used against him in the death penalty phase of a criminal prosecution. (451 U.S. 454, 468-69, 101 S.Ct. 1866, 1876, 68 L.Ed.2d 359, 372-73.) However, if the use of such statements is confined to noncriminal proceedings, no *Miranda* issue arises. 451 U.S. 454, 465, 101 S.Ct. 1866, 1874, 68 L.Ed.2d 359, 370.

While we agree with the holding in *English* that sexually dangerous persons proceedings are not criminal proceedings, we disagree with the *English* court insofar as it would allow a defendant to refuse to answer questions which may incriminate him. (*People* v. *English* (1964), 31 Ill.2d 301, 307-08, 201 N.E.2d 455.) To allow even such a limited privilege would unduly frustrate the purposes of the sexually dangerous persons provisions by making it nearly impossible to identify sexually dangerous persons. Moreover, such a privilege is not necessary to protect the defendant's fifth amendment rights. As *Estelle* v. *Smith* makes clear, courts may simply exclude the defendant's compelled testimony from use in subsequent criminal proceedings. (*Estelle* v. *Smith* (1981), 451 U.S. 454, 468-69, 101 S.Ct. 1866, 1876, 68 L.Ed.2d 359, 372-73.) We therefore hold that a defendant's statements to a psychiatrist in a compulsory examination under the provisions here involved may not be used against him in any subsequent criminal proceedings. Consequently, defendants must answer all questions at such examinations regardless of the possible incriminatory nature of the answers.

Accordingly, the appellate court erred when it barred the use of testimony based upon defendant's statements to Dr. Colen and Dr. Beck. It would have been proper to allow into evidence both the statements themselves and the psychiatrists' conclusions based thereon.

We need not reach the issue of whether or not defendant waived his privilege against self-incrimination. Our holding that he did not have such a privilege in this type of proceeding makes a discussion of waiver unnecessary.

Defendant also argues, and the appellate court apparently agreed, that the statute here involved requires that the State demonstrate more than one actual act of sexual assault or sexual molestation. The State, on the other hand, claims that the statute requires only a showing of "propensity," and does not require that the State prove any actual crime. In our view, neither position is supported by the statutory language.

Section 1.01 of the Sexually Dangerous Persons Act defines sexually dangerous persons as follows:

> "All persons suffering from a mental disorder, which mental disorder has existed for a period of not less than one year, immediately prior to the filing of the petition hereinafter provided for, coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children, are hereby declared sexually dangerous persons." (Ill.Rev.Stat.1983, ch. 38, par. 105-1.01.)

In *People* v. *Pembrock* (1976), 62 Ill.2d 317, 321-22. 342 N.E.2d 28, the court construed this language as requiring proof of three separate elements:

> "(1) the existence of a mental disorder for more than one year; (2) the existence of criminal propensities to the commission of sex offenses; and (3) the existence of demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children."

It is clear, therefore, that the statute requires more than the proof of mere "propensity"; it also requires that the State prove that the defendant has "demonstrated" this propensity. This language can only mean that the State must prove at least one act of or attempt at sexual assault or sexual molestation.

There is, however, nothing in the statute requiring the State to prove multiple sex crimes. One purpose of the statute is to prevent mentally ill persons from being held criminally responsible for crimes committed while mentally ill. (*People* v. *Studdard* (1972), 51 Ill.2d 190, 196, 281 N.E.2d 678; *People* v. *Sims* (1943), 382 Ill. 472, 476, 47 N.E.2d 703.) It would be illogical to

construe the statute to require that a defendant cannot be treated until he has committed more than one assault. Furthermore, the statute is primarily concerned with prediction of the defendant's future conduct; the requirement that the defendant must have "demonstrated" his propensities means only that the commitment order cannot be based *solely* on psychological speculation. We therefore hold that the plural language of the statute—"acts of sexual assault or acts of sexual molestation"—refers to the defendant's future propensities, not to the demonstrated conduct.

We must, however, address the further issue, raised on cross-appeal, of whether the evidence at trial establishes even one act of sexual assault. Therefore, the sole evidence of a sexual asault was Christine Ray's testimony. Sexual assault, at the time of the alleged crime, required a sexual act achieved by "force or threat of force." (Ill.Rev.Stat.1983, ch. 38, par. 11-3, now repealed and replaced by Ill.Rev.Stat., 1984 Supp., ch. 38, par. 12-13, which contains a similar requirement.) Defendant claims that the evidence does not establish beyond a reasonable doubt that he used force upon Christine Ray, or threatened her with force. It is for the trier of fact, however, to determine the weight and sufficiency of the evidence, and the reviewing court should not substitute its judgment for the trier of fact unless the evidence is so improbable as to raise a reasonable doubt of guilt. (*People* v. *Molstad* (1984), 101 Ill.2d 128, 133, 77 Ill.Dec. 775, 461 N.E.2d 398; *People* v. *Davis* (1983), 95 Ill.2d 1, 27, 69 Ill.Dec. 136, 447 N.E.2d 353.) In this case we are convinced that there was sufficient evidence for the trial court to find that defendant forced Christine Ray to perform sexual acts.

First of all, defendant's unnanounced appearance in Ms. Ray's automobile indicated potential hostility, as did his demand for her to drive to a "romantic place—or else." Defendant reached over and grabbed Ray at the parking lot gate when he thought she was trying to exit the car, an action which gave an ominous cast to his repeated insistence that she was not free to leave the car until "he got what he wanted." Under these circumstances the trial court could properly have found a

threat of force, and there was no need for Ms. Ray to risk injury by testing out those threats. While Ray's experiences with her former boyfriend have increased her fear of physical harm, there was adequate evidence for the trial court to find that defendant himself threatened her.

In conclusion, the appellate court erred in barring the use of testimony based upon defendant's statements to Dr. Colen and Dr. Beck, and also erred in ruling that the State must demonstrate more than one act of sexual assault. In addition, we are convinced that there was sufficient evidence to establish defendant's sexually dangerous status beyond a reasonable doubt. We therefore reverse the judgment of the appellate court and affirm the judgment of the circuit court. We remand this cause to the circuit court of Peoria County for further proceedings.

Appellate court reversed; circuit court affirmed; cause remanded.

SUPREME COURT OF THE UNITED STATES

No. 85-5404

TERRY B. ALLEN,

Petitioner,

v.

ILLINOIS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

November 12, 1985

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court U.S.
FILED
JAN 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-5404

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

TERRY B. ALLEN,

Petitioner,

v.

ILLINOIS,

Respondent.

On Writ of Certiorari
To The Illinois Supreme Court

PETITIONER'S OPENING BRIEF ON MERITS

ROBERT AGOSTINELLI
Deputy Defender
VERLIN R. MEINZ
*PETER A. CARUSONA
Assistant Defenders
Office of the State Appellate Defender
628 Columbus Street-Suite 308
Ottawa, Illinois 61350
(815) 434-5531
COUNSEL FOR PETITIONER

JEAN HERIGODT
Assistant Public Defender
61[illegible] W. Sauganash
First Floor
Chicago, Illinois 60646
(312) 545-2953
OF COUNSEL
*Counsel of Record

PETITION FOR WRIT OF CERTIORARI FILED SEPTEMBER 16, 1985
CERTIORARI GRANTED NOVEMBER 12, 1985

QUESTIONS PRESENTED FOR REVIEW

1. Does the Fifth Amendment privilege against self-incrimination apply in an Illinois sexually-dangerous-person proceeding, a proceeding which arises only in the context of a criminal prosecution, is conducted much like a criminal trial, and results in both an adjudication of sexual dangerousness and an indeterminate commitment to the Illinois Department of Corrections?

2. Whether, since the privilege should be held to apply to such a proceeding, the respondent could properly show the petitioner's dangerousness with psychiatric opinions based on his statements made while in custody and during compulsory exams not preceded by Miranda-style advice?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW. 1

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATUTES INVOLVED 3

STATEMENT 4

SUMMARY OF ARGUMENT 8

ARGUMENT 13

BECAUSE THE PRIVILEGE AGAINST SELF-INCRIMINATION SHOULD BE HELD TO APPLY IN AN ILLINOIS SEXUALLY-DANGEROUS-PERSON PROCEEDING (A PROCEEDING CLOSELY RELATED TO A CRIMINAL PROSECUTION AND RESULTING IN A FINDING OF DANGEROUSNESS AND AN INDETERMINATE COMMITMENT TO A PENAL INSTITUTION), THE RESPONDENT COULD NOT PROPERLY SHOW PETITIONER'S DANGEROUSNESS WITH PSYCHIATRIC OPINIONS BASED ON HIS STATEMENTS MADE WHILE IN CUSTODY AND DURING COMPULSORY EXAMS NOT PRECEDED BY MIRANDA-STYLE ADVICE 13

A. THE ILLINOIS SEXUALLY DANGEROUS PERSON PROCEEDING, THOUGH DENOMINATED "CIVIL" IN NATURE, ARISES ONLY IN THE CONTEXT OF A FORMAL PROSECUTION FOR CRIME, IS CONDUCTED MUCH LIKE A PROSECUTION FOR CRIME, AND -- LIKE A CRIMINAL PROSECUTION -- CAN RESULT IN A COMMITMENT TO THE DEPARTMENT OF CORRECTIONS . . 16

B. SINCE THE ILLINOIS SEXUALLY-DANGEROUS-PERSON PROCEEDING IS SO RELATED TO A FORMAL CRIMINAL PROSECUTION, INVOLVES A DISTINCT ADJUDICATION OF DANGEROUSNESS, AND RESULTS IN AN INDEFINITE COMMITMENT TO A

PENAL INSTITUTION, PRECEDENTS OF THIS COURT DEMAND THAT THE PRIVILEGE AGAINST SELF-INCRIMINATION BE HELD APPLICABLE TO THAT PROCEEDING. 24

C. THE ILLINOIS SUPREME COURT'S DECISION THAT THERE IS NO FIFTH-AMENDMENT PRIVILEGE IN SEXUALLY-DANGEROUS-PERSON PROCEEDINGS CANNOT STAND ON ITS OWN TERMS INASMUCH AS IT FOCUSES ONLY ON THE "CIVIL" LABEL GIVEN THE PROCEEDING AND TOTALLY MISPERCEIVES THE VARIOUS INTERESTS INVOLVED IN THE PROCESS. 34

D. SINCE THE PRIVILEGE AGAINST SELF-INCRIMINATION APPLIES TO THE SEXUALLY-DANGEROUS-PERSON PROCEEDING, SINCE THE PETITIONER WAS NOT WARNED OF THAT PRIVILEGE BEFORE HIS CUSTODIAL EXAMINATION BY THE APPOINTED PSYCHIATRISTS, AND SINCE THE PSYCHIATRISTS BASED THEIR OPINIONS UPON THE PETITIONER'S UNWARNED STATEMENTS TO THEM, THE PROSECUTION COULD NOT PROPERLY INTRODUCE THE PSYCHIATRIC OPINIONS AGAINST THE PETITIONER . . . 45

CONCLUSION 52

TABLE OF AUTHORITIES

CASES:

Boyd v. United States, 116 U.S. 616 (1886) 29

Cross v. Harris, 135 U.S. App. D.C. 259, 418 F.2d 1095 (1969) 39

Culombe v. Connecticut, 367 U.S. 568 (1961) 31

Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), vacated on other grounds, 422 U.S. 563 (1975) 36

Estelle v. Smith, 451 U.S. 454 (1981) . . . . . Passim

French v. Blackburn, 428 F. Supp. 1351 (M.D. N.C. 1977), aff'd, 443 U.S. 901 (1979) (Mem.) 37

Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911) 29

Haskett v. State, 255 Ind. 206, 263 N.E.2d 529 (1970). 33

Holmes' Appeal, 379 Pa. 599, 109 A.2d 523 (1954) . . . 32

Humphrey v. Cady, 405 U.S. 504 (1972) . . . . . Passim

In re Gault, 387 U.S. 1 (1967) . . . . . Passim

Malloy v. Hogan, 378 U.S. 1 (1964) 13,29

Mathews v. Eldridge, 424 U.S. 319 (1976) 39,40,41,44

Matter of Rizer, 87 Ill. App. 3d 795, 409 N.E.2d 383 (1980) 43

McCarthy v. Arndstein, 266 U.S. 34 (1924) 29

Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940) 25,26,27

Miranda v. Arizona, 384 U.S. 436 (1966). 47,48,50

Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972) 43

People v. Abney, 90 Ill. App. 2d 235, 232 N.E.2d 784 (1967) 22

People v. Allen, 123 Ill. App. 3d 669, 463 N.E.2d 135 (1984), rev'd on other grounds, 107 Ill. 2d 91, 481 N.E.2d 690 (1985) . . . . . Passim

People v. Burkhart, 116 Ill. App. 3d 708, 452 N.E.2d 375 (1983) 18

People v. Burnick, 14 Cal.3d 306, 121 Cal. Rptr. 488, 535 P.2d 352 (1975). 33,40

People v. Capoldi, 37 Ill. 2d 11, 225 N.E.2d 634 (1967) 23

People v. Davis, 127 Ill. App. 3d 49, 468 N.E.2d 172 (1974) 22

People v. Dykema, 89 Ill. App. 2d 409, 232 N.E.2d 471 (1967) 19

People v. Jenneski, 36 Ill. 2d 624, 225 N.E.2d 19 (1967) 19

People v. McDonald, 44 Ill. App. 2d 348, 194 N.E.2d 541 (1963) 19

People v. Nastasio, 19 Ill. 2d 524, 168 N.E.2d 725 (1960) 18,20

People v. Newbern, 18 Ill. App. 3d 532, 310 N.E.2d 42 (1974) 19

People v. Parrott, 108 Ill. App. 3d 222, 438 N.E.2d 1313 (1982) 22,23

People v. Patch, 9 Ill. App. 3d 134, 293 N.E.2d 661 (1973) 19

People v. Pearson, 65 Ill. App. 2d 264, 212 N.E.2d 715 (1965) 20

People v. Perbrock, 62 Ill. 2d 317, 342 N.E.2d 28 (1976) 17,20

People v. Pygott, 64 Ill. App. 2d 284, 211 N.E.2d 382 (1965) 19

People v. Redlich, 402 Ill. 270, 83 N.E.2d 736 (1949). 17

People v. Shiro, 52 Ill. 2d 279, 287 N.E.2d 708 (1972) 21,22,23

People v. Sims, 382 Ill. 472, 47 N.E.2d 703 (1943) . . 20

People v. Sly, 82 Ill. App. 3d 742, 403 N.E.2d 72 (1980) 23

People v. Sweeney, 114 Ill. App. 2d 81, 251 N.E.2d 897 (1969) 23

People v. Thingvold, 113 Ill. App. 2d 479, 251 N.E.2d 553 (1969) 23

People v. Whitney, 33 Ill. App. 3d 729, 338 N.E.2d 233 (1975) 22

Potts v. People, 80 Ill. App. 2d 195, 224 N.E.2d 281 (1967) 18

Rogers v. Richmond, 365 U.S. 534 (1961) 29

Sas v. State of Maryland, 295 F.Supp. 389 (D. Md. 1969), aff'd sub nom. Tippett v. State of Maryland, 436 F.2d 1153 (4th Cir. 1971), cert. dismissed as improvidently granted sub nom. Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972) 37

Specht v. Patterson, 386 U.S. 605 (1967) . . . . . Passim

United States ex rel. Gerchman v. Maroney, 355 F.2d 302 (3rd Cir. 1966) 27

United States ex rel. Stachulak v. Coughlin, 520 F.2d 931 (7th Cir. 1975), cert. denied, 424 U.S. 947 (1976) 33,38,40

STATUTES:

Ill. Rev. Stat. ch. 38, §12-14(c) (1983) 23

Ill. Rev. Stat. ch. 38, §105-1.01, et seq. (1981). . . Passim

Ill. Rev. Stat. ch. 38, §§820.01-825(e) (1960 Supp.) . 17

Ill. Rev. Stat. ch. 38, §1003-6-3(a)(2) (1983) 24

Ill. Rev. Stat. ch. 38, §1005-8-1(a)(3) (1983) 24

Ill. Rev. Stat. ch. 91½, §3-208 (1983) 29,43

Ill. Rev. Stat. ch. 91½, §§3-813, 3-814 (1983) 38

MISCELLANEOUS:

Directory of Juvenile and Adult Correctional Agencies, Ill. 115 (A.C.A. 1984) 21

Out of Tune With the Times; The Massachusetts SDP Statute, 45 B.U.L. Rev. 391 (1965) 36,37

Stewart, Comment Concerning Proposed Legislation for the Commitment of Sex Offenders, 3 J. Mar. L. Q. 407 (1938) 18

The Plight of the Sexual Psychopath: A Legislative Blunder and Judicial Acquiescence, 41 Notre Dame Law. 527 (1965-66) 36,39

NO. 85-5404

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

TERRY B. ALLEN,

Petitioner,

v.

ILLINOIS,

Respondent.

On Writ of Certiorari
To The Illinois Supreme Court

PETITIONER'S OPENING BRIEF ON MERITS

OPINION BELOW

The opinion of the Illinois Supreme Court in this case is reported as People v. Allen, 107 Ill. 2d 91, 481 N.E.2d 690 (1985). (The court's opinion is also set forth in the Joint Appendix at pages 41 to 52.)

JURISDICTION OF THE COURT

The opinion of the Illinois Supreme Court was filed on July 17, 1985. The petition for writ of certiorari was filed within 60 days thereafter and granted by order of this Court on November 12, 1985.

This Court's jurisdiction in the matter rests on 28 U.S.C. Sec. 1257(3) inasmuch as petitioner asserts a violation of his rights under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Sexually Dangerous Person Act, Article 105 of the Illinois Code of Criminal Procedure. Ill. Rev. Stat. ch. 38, §§105-1.01, et seq. (See Appendix A.)

STATEMENT OF THE CASE

The petitioner Terry B. Allen (hereinafter referred to as the petitioner) was committed to the Illinois Department of Corrections for an indeterminate term following his adjudication as a sexually dangerous person. That adjudication was based, in large part, upon statements the petitioner had made to two court-appointed psychiatrists in separate compulsory examinations. Throughout the trial- and appellate-court processing of his case, the petitioner maintained that the use of his statements violated his Fifth Amendment privilege against self-incrimination. The Illinois Supreme Court ruled, however, that he had no privilege to claim in a sexually-dangerous-person action.

The proceeding against the petitioner began with the filing of an information charging him with the offenses of deviate sexual assault and unlawful restraint, violations of Ill. Rev. Stat. ch. 38, §§11-3(a) and 10-3(a), respectively (J.A. 1-2). Citing the same sex offense, the State then filed a petition to have the petitioner declared a sexually dangerous person under Article 105 of the Code of Criminal Procedure [Ill. Rev. Stat. ch. 38, §105-1.01, et seq. (1981)] (J.A. 3-4). That declaration required proof of a person's 1) having a mental disorder for one year or more, his 2) having criminal propensities to the commission of sex offenses and his 3) having demonstrated those

propensities toward acts of sexual assault. Ch. 38, §105-1.01. Pursuant to statute, the court appointed two psychiatrists to examine the petitioner in regard to the sexual-dangerousness petition (J.A. 5).

The trial court later conducted a preliminary hearing on the charges in the information and dismissed them for lack of probable cause (J.A. 6). Since the dangerousness petition depended upon a valid underlying charge, it was dismissed as well. The petition was reinstated, however (C41), after the petitioner was indicted for the original offenses of sexual assault and unlawful restraint (J.A. 7-8).

The petition came on for hearing before the court, the petitioner having waived his right to a jury. Three witnesses testified at that hearing, all on behalf of the prosecution. The two psychiatrists who had examined the petitioner took the stand. Each opined that the petitioner was a sexually dangerous person as defined in Article 105 (R.101-02; R.128-131; J.A. 35,40). Each also noted that his opinion was based on statements made by the petitioner during the court-ordered custodial examination (R.94; R.135), which in each case was wide-ranging and involved discussion of the petitioner's prior sexual activity (which included no prior convictions) (R.117-118; R.131; J.A. 38).

The alleged victim of the charged sexual assault, Christine Ray, also testified for the prosecution. She testified that she

conversed with petitioner about 30 to 45 minutes at a McDonald's Restaurant where she had been working. After the conversation ended, Ray left in her automobile. She noticed the petitioner in her back seat. The petitioner asked her to take him to "a romantic place -- or else". Ray drove to an airport parking lot where the petitioner lay on top of her and simulated intercourse, although both were fully clothed. After petitioner removed his pants, Ray manipulated his penis manually, agreeing to satisfy him if he would let her leave. According to Ray, petitioner then pushed her head down, forcing her to perform fellatio. Ray subsequently entered the parking terminal alone to pay the parking fee. She told the attendant that a man had forced her to go to the airport, but she made no other attempt to summon help. Ray returned to the car and gave petitioner a ride to his friend's home (J.A. 43-45).

At the conclusion of the hearing, the trial court found the petitioner to be a sexually dangerous person (J.A. 11). It also committed the petitioner to the Illinois Department of Corrections (J.A. 13), where, by Illinois law, he will be obliged to remain until he proves that he is no longer sexually dangerous [Ill. Rev. Stat. ch. 38, §105-9 (1981)].

The petitioner filed a motion to vacate the adjudication and commitment (J.A. 12,14-16), repeating his assertions from the dangerousness hearing (e.g., R.87-91; R.96-97; R.129) that the

prosecution's use of the psychiatrists' opinions violated his Fifth Amendment privilege against self-incrimination. Seeing that motion denied (J.A. 21), the petitioner filed a notice of appeal.

The petitioner's adjudication and commitment were reversed on appeal to the Appellate Court of Illinois, Third Judicial District. The court ruled that the admission of the psychiatrists' conclusions had in fact violated the petitioner's privilege against self-incrimination since they were based upon petitioner's compelled inculpatory statements during the psychiatric exams. People v. Allen, 123 Ill. App. 3d 669, 463 N.E.2d 135 (1984) (J.A. 23-28).

After granting the State's petition for leave to appeal, the Illinois Supreme Court reversed the Appellate Court and reinstated petitioner's adjudication and commitment. As noted above, the court ruled that there is no privilege against self-incrimination in Illinois' sexually-dangerous-person proceeding. People v. Allen, 107 Ill. 2d 91, 481 N.E.2d 690 (1985) (J.A. 41-52).

SUMMARY OF ARGUMENT

Throughout the process by which he was adjudicated a sexually dangerous person and indefinitely committed to the Illinois Department of Corrections, the petitioner has claimed a violation of his Fifth Amendment privilege against self-incrimination. The Illinois Supreme Court affirmed the adjudication and commitment, bluntly ruling that the privilege did not apply in Illinois' sexually-dangerous-person proceeding. That ruling, though, is erroneous under the precedents of this Honorable Court and must be reversed.

A. The Illinois sexual-dangerousness proceeding is denominated "civil" in nature, both by the legislature and the case law interpreting it. Examination of the proceeding reveals, however, the close relationship between it and a criminal prosecution. An allegation of sexual dangerousness, first of all, can be advanced only in the context of an existing criminal case. Dangerousness proceedings, once commenced in lieu of formal criminal prosecution, are carried on much like a criminal trial: the accused has rights to counsel, a jury hearing and confrontation of the witnesses against him. The prosecution must prove beyond a reasonable doubt that the accused 1) has a mental disorder in existence for a year or more, 2) has criminal

propensities to the commission of sex offenses and 3) has demonstrated those propensities toward acts of sexual assault or child-molestation. If the prosecution meets its burden, the accused is declared a sexually dangerous person and is committed to the Illinois Department of Corrections for an indeterminate term. He is released from penal confinement only if he can prove, by a preponderance of the evidence in a recovery action, that he is no longer sexually dangerous. Numerous aspects of the dangerousness proceeding, particularly the close relation to a criminal prosecution and the end result of indefinite commitment to a penal facility, belie the proceeding's label as "civil".

B. In critical respects, this Illinois sexually-dangerous-person proceeding is similar to other proceedings examined by this Honorable Court. It is a sexual-psychopath proceeding much like those considered in Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940), Specht v. Patterson, 386 U.S. 605 (1967) and Humphrey v. Cady, 405 U.S. 504 (1972). Those decisions of this Court recognize the extreme seriousness of the sexual-psychopath proceeding and the grave potential for its abuse and, as a consequence, call for a "full panoply" of procedural protections, "all those safeguards which are fundamental rights and essential to a fair trial". Specht. The privilege against self-incrimination must be included among those safeguards, not only because the privilege is necessary to deter

potential abuse of the dangerousness proceeding but also because the privilege is recognized as an "essential mainstay" of the accusatorial system [Malloy v. Hogan, 378 U.S. 1, 7-8 (1964)].

Specific Fifth-Amendment jurisprudence of this Court supports the applicability of the privilege to the sexual-dangerousness proceeding. The privilege has been held to apply in widely disparate types of proceedings. Importantly for purposes of this case, this Court has ruled the privilege applicable in juvenile proceedings [In re Gault, 387 U.S. 1 (1967)] and capital sentencing proceedings [Estelle v. Smith, 451 U.S. 454 (1981)]. Gault and Estelle counsel against reference to the "'civil' label-of-convenience" attached to a proceeding and call instead for consideration of the exposure which a compelled statement invites. The exposure involved in the sexual-dangerousness proceeding is both an indeterminate commitment to a penal facility and a severe stigmatization as a mental defective with criminal sexual propensities. That exposure demands that the privilege be held applicable to the proceeding.

C. The Illinois Supreme Court ruled the privilege inapplicable but that ruling cannot be sustained even on its own terms. The court focused on the "civil" label attached to the proceeding, obviously in contravention of In re Gault. It also focused on the supposed treatment purpose of the proceeding -- a focus which blinks the hard realities of both indefinite

commitment to a penal institution and severe stigmatization as a "sexually dangerous person". A proceeding which results in an adjudication of sexual dangerousness and indefinite incarceration cannot reasonably be termed "civil" so as to avoid application of the Fifth Amendment.

In rejecting the application of the privilege, the Illinois court also weighed various interests involved in the dangerousness proceeding. It was both slow and fast, light and heavy, though, in placing thumbs upon the scales. It conceded that the private interest was "great" -- no overstatement given the commitment and stigmatization involved. The court also thought the privilege to be of little value in insuring the reliability of the proceeding -- though an obvious concern of the privilege is the reliability of compelled statements, especially those made, as here, by persons with alleged mental disorders. Finally, the Illinois court thought that the purpose of the proceeding would be totally thwarted if the privile were applicable -- a theory which ignores that the prosecution can prove both criminal propensities and their demonstration as easily with other evidence and that, under Illinois' civil-commitment scheme, application of the privilege is not deemed an impairment of the commitment process.

D. If, contrary to the Illinois Supreme Court's ruling, the privilege against self-incrimination does apply to Illinois'

sexually-dangerous-person proceeding, then the petitioner's adjudication here surely must be reversed. That conclusion is as clear as is the violation of the Fifth Amendment privilege in this case under the principles of Estelle v. Smith, 451 U.S. 454 (1981). The petitioner here was required to speak to two court-appointed psychiatrists. Those experts, examining the petitioner in a custodial setting, went beyond the neutral purpose of judging the petitioner's mental condition to the decidedly adverse purpose of calculating his sexual dangerousness as defined in the pertinent statute. Even though the petitioner offered no psychiatric evidence of his own, the experts gave opinions of the petitioner's being sexually dangerous -- basing their opinions on the petitioner's statements during the compulsory exams. These exams were not preceded by advice regarding the petitioner's right to silence or the potential use of any statements he made. Given these circumstances, Estelle v. Smith compels the conclusion that the prosecution could not properly introduce the psychiatric opinions against the petitioner in its attempt to establish his sexual dangerousness.

ARGUMENT

BECAUSE THE PRIVILEGE AGAINST SELF-INCRIMINATION SHOULD BE HELD TO APPLY IN AN ILLINOIS SEXUALLY-DANGEROUS-PERSON PROCEEDING (A PROCEEDING CLOSELY RELATED TO A CRIMINAL PROSECUTION AND RESULTING IN A FINDING OF DANGEROUSNESS AND AN INDETERMINATE COMMITMENT TO A PENAL INSTITUTION), THE RESPONDENT COULD NOT PROPERLY SHOW PETITIONER'S DANGEROUSNESS WITH PSYCHIATRIC OPINIONS BASED ON HIS STATEMENTS MADE WHILE IN CUSTODY AND DURING COMPULSORY EXAMS NOT PRECEDED BY MIRANDA-STYLE ADVICE.

The Fifth Amendment of the Constitution of the United states -- made applicable to the states by virtue of the Fourteenth Amendment [Malloy v. Hogan, 378 U.S. 1 (1964)] -- demands that no person "shall be compelled in any criminal case to be a witness against himself" (emphasis added). The question presented here is whether that privilege against self-incrimination applies in a sexually-dangerous-person proceeding under Article 105 of Illinois Code of Criminal Procedure. Such a proceeding arises only in the context of a criminal prosecution, follows closely the procedure of a criminal trial and results in a special dangerousness finding and an indeterminate commitment to an institution of the Illinois Department of Corrections. The Supreme Court of Illinois nevertheless labeled the proceeding "civil" in nature and ruled

that the accused person in such a proceeding had no Fifth Amendment privilege against self-incrimination. Since that ruling is clearly erroneous under the precedents of this Honorable Court, the petitioner respectfully requests its reversal.

The question of the applicability of the Fifth Amendment privilege is squarely presented in the case at bar. The petitioner, initially named in a criminal information, was thereafter alleged to be a sexually dangerous person under Article 105. By virtue of that Article, he was required to be examined by two psychiatrists. In the subsequent hearing on the sexually-dangerous-person petition, those psychiatrists opined that the petitioner was such a person -- basing their opinions, in substantial part, upon the petitioner's statements to them in the course of the compulsory examinations. The petitioner resisted the introduction of the psychiatric opinions, claiming the privilege of the Fifth Amendment and pointing to the psychiatrists' failure to warn him of that privilege and of the possible use of his statements to them. That challenge failed and the petitioner was adjudicated a sexually dangerous person and committed to the Department of Corrections indefinitely. His argument regarding the applicability of the privilege against self-incrimination and the consequent need for pre-examination warnings was accepted on his appeal to the Appellate Court of

Illinois. People v. Allen, 123 Ill. App. 3d 669, 463 N.E.2d 135 (1984) (J.A. 23-28). The Illinois Supreme Court disagreed, however, flatly ruling that the petitioner had no privilege against self-incrimination to assert in the course of the proceeding against him and, thus, that pre-exam warnings were unnecessary. People v. Allen, 107 Ill. 2d 91, 481 N.E.2d 690 (1985) (J.A. 41-52).

In arguing the error of that ruling in this Court, the petitioner examines first the operation of the sexually-dangerous-person process in Illinois. He goes on to demonstrate that this type of proceeding is so serious in nature and so open to potential abuse that, under precedents of this Court, it necessarily must involve the protection of the Fifth Amendment. He shows additionally that that conclusion is certainly borne out by analysis of the Article 105 proceeding in the light of specific Fifth-Amendment jurisprudence of this Court. The no-privilege decision of the Illinois Supreme Court, the petitioner goes on to show, cannot be sustained as it focuses only on a "civil" label attached to the proceeding and miscalculates the interests involved in the process. Finally, the petitioner demonstrates that the adjudication against him must be reversed since the State's use of psychiatric evidence in that proceeding violated the privilege against self-incrimination which he enjoyed.

A. THE ILLINOIS SEXUALLY DANGEROUS PERSON PROCEEDING, THOUGH DENOMINATED "CIVIL" IN NATURE, ARISES ONLY IN THE CONTEXT OF A FORMAL PROSECUTION FOR CRIME, IS CONDUCTED MUCH LIKE A PROSECUTION FOR CRIME, AND -- LIKE A CRIMINAL PROSECUTION -- CAN RESULT IN A COMMITMENT TO THE DEPARTMENT OF CORRECTIONS.

The petitioner's involvement with Illinois' sexually-dangerous-persons proceedings began with his being charged, by information filed in the Circuit Court of Peoria County, Illinois, with the offenses of deviate sexual assault and unlawful restraint (J.A. 1-2). See Ill. Rev. Stat. ch. 38, §§11-3(a) and 10-3(c) (1981). Some three weeks later, the prosecution filed a petition alleging that the petitioner was a sexually dangerous person (J.A. 3-4). In that petition, the state specifically cited the deviate sexual assault which was the subject of the earlier information.

Article 105 of the Illinois Code of Criminal Procedure, cited in the State's petition against the petitioner, defines "sexually dangerous persons" as

> [a]ll persons suffering from a mental disorder, which mental disorder has existed for a period of not less than one year, immediately prior to the filing of the petition hereinafter provided for, coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward

acts of sexual assault or acts of sexual molestation of children.

Ill. Rev. Stat. ch. 38, §105-1.01 (1981). The allegation and adjudication of being a sexually dangerous person thus involves three distinct elements: a mental disorder existing for a year or more, criminal propensities to commit sex offenses and a demonstration of those propensities toward sex offenses. See People v. Pembrock, 62 Ill. 2d 317, 342 N.E.2d 28, 30 (1976); People v. Allen, 123 Ill. App. 3d 669, 463 N.E.2d 135 (1984), rev'd on other grounds, 107 Ill. 2d 91, 481 N.E.2d 690 (1985).

This sexually-dangerous-person legislation was initially enacted in 1938 and reformulated in 1955. See Ill. Rev. Stat. ch. 38, §§820.01-825e (1960 Supp.). In 1963, it was incorporated into the Illinois Code of Criminal Procedure as Article 105. In its original form, the legislation was considered an expansion of the concepts of fitness and sanity and was designed to prevent persons with sexual-related mental disorders from being tried. See People v. Redlich, 402 Ill. Ill. 270, 83 N.E.2d 736, 739-740 (1949). With its reformulation in 1955, however, the legislation changed its focus. In changing from the initial Criminal Sexual Psychopathic Persons Act to the 1955 (and present) Sexually Dangerous Persons Act, the process shifted in purpose to providing treatment of an accused's sex-offense propensities and to protecting the public from the accused until his treatment has

been effected. See People v. Burkhart, 116 Ill. App. 3d 708, 452 N.E.2d 375, 377 (1983).[1]

The Sexually Dangerous Persons Act specifically announces that it is civil in nature. Ill. Rev. Stat. ch. 38, §105-3.01 (1983). Examination of the Act and case law interpreting it, however, reveals the many relationships and similarities between the sexually-dangerous-person proceeding and the formal criminal prosecution. The proceeding, first of all, does not arise in any context other than a formal prosecution for crime. An allegation of sexual dangerousness is possible only after a person has been charged with a criminal offense. See ch. 38, §105-3; Potts v. People, 80 Ill. App. 2d 195, 224 N.E.2d 281, 283 (1967). The criminal charge and dangerousness proceeding are closely related; indeed, the proceeding cannot continue if the underlying criminal charge fails. People v. Nastasio, 19 Ill. 2d 524, 168 N.E.2d 728, 732 (1960).

The decision to proceed under the Act rather than with the formal prosecution is totally within the discretion of the prosecutor. Neither the criminal defendant nor the court may

---

[1] Illinois commentators writing at the time of the enactment of the initial legislation, however, noted even then a strong legislative interest in protecting the public from the sex offender. See Stewart, Comment Concerning Proposed Legislation for the Commitment of Sex Offenders, 3 J. Mar. L. Q. 407 (1938).

seek a dangerousness proceeding. People v. Newbern, 18 Ill. App. 3d 532, 310 N.E.2d 42, 47-48 (1974). The prosecutor, though, must make an election. He cannot first obtain a conviction for a criminal offense and then commence a dangerousness proceeding based on the same incident. People v. Patch, 9 Ill. App. 3d 134, 293 N.E.2d 661, 665 (1973).

If the prosecutor does file a petition alleging a person's sexual dangerousness, the court is obliged to appoint two psychiatrists to examine the accused (called the "respondent" in the proceeding). Ch. 38, §105-4 (1981). The psychiatrists personally examine the respondent and file their reports in writing with the court, also serving a copy upon the accused himself. Id. This examination provision of the Act is strictly construed. People v. Pygott, 64 Ill. App. 2d 284, 211 N.E.2d 382 (1965). The psychiatrists must file their reports as required. See People v. McDonald, 44 Ill. App. 2d 348, 194 N.E.2d 541 (1963). The reports or testimony of one or both of these psychiatrists is essential to the dangerousness proceeding. People v. Dykema, 89 Ill. App. 2d 409, 232 N.E.2d 471 (1967).

Counsel must be appointed to represent the accused during further proceedings under the Act. Ch. 38, §105-5; People v. Jenneski, 36 Ill. 2d 624, 225 N.E.2d 19 (1967). The respondent has the right to demand trial by jury on the question of his sexual dangerousness. Ch. 38, §105-5. The matter then comes on

for formal hearing, during which the respondent enjoys the right to confront and cross-examine witnesses. People v. Nastasio, 168 N.E.2d at 731. The court must rigidly adhere to the procedural rules in the course of the hearing and insist upon the introduction of competent evidence. People v. Pearson, 65 Ill. App. 2d 264, 212 N.E.2d 715, 716 (1965). The prosecution, though, is authorized to introduce evidence of other criminal activity on the respondent's part in order to prove his dangerousness. Ch. 38, §105-5; People v. Sims, 382 Ill. 472, 47 N.E.2d 703, 705 (1943). At the conclusion of the hearing, the trier of fact is asked to determine whether the prosecution has proved the person's sexual dangerousness beyond a reasonable doubt. Ill. Rev. Stat. ch. 38, §105-3.01 (1983); People v. Pembrock, 62 Ill. 2d 317, 342 N.E.2d 28 (1976).

If that decision is in the accused's favor, the dangerousness process ends -- with the prosecution seemingly free to proceed on the underlying criminal charge.[2] If the decision is one of the respondent's sexual dangerousness, however, the court is obliged to commit the respondent to the custody of the Illinois Department of Corrections. The Department, in turn, is

---

[2]Research reveals no Illinois authority precisely on point. It is clear, though, that the underlying charge remains in effect. See Ill. Rev. Stat. ch. 38, §105-9 (1981).

required by statute to "keep safely the person so committed", to place the person in any of its facilities "set aside for the care and treatment of sexually dangerous persons". Ch. 38, §105-8 (1981). The statute permits the Department to transfer the committed person to another state Department or Agency (Id.) but requires that the Department at all times provide care and treatment designed to effect the person's recovery. Id.; People v. Shiro, 52 Ill. 2d 279, 287 N.E.2d 708, 711 (1972).[3]

The sexually dangerous person's commitment to the Department is indefinite in duration. The person is permitted by statute to file, at any time following commitment, an application showing that he has recovered. Ch. 38, §105-9. The Department of Corrections responds with a socio-psychiatric report on the applicant and the matter is set for hearing before the original committing court. Id. That hearing must be commenced within a

---

[3]In practice, the sexually dangerous person in Illinois is routinely sent to the Menard Psychiatric Center in southern Illinois. The Center, a maximum-security penal institution, originally was part of the century-old Menard Penitentiary but was designated a separate facility in 1933. It houses not only sexually dangerous persons but also, in far greater number, prisoners from other institutions who are referred to the Center for psychiatric treatment. Directory of Juvenile and Adult Correctional Agencies, at Ill. 115 (A.C.A. 1984).

Research reveals no transfer of a sexually dangerous person to another Department or facility, probably because of security concerns.

reasonable time following the recovery application [People v. Abney, 90 Ill. App. 2d 235, 232 N.E.2d 784, 786 (1967)]; the committed person again enjoys the rights to counsel and to a hearing by jury (People v. Shiro, 287 N.E.2d at 710). He is required, though, to prove his recovery by a preponderance of the evidence. People v. Parrott, 108 Ill. App. 3d 222, 438 N.E.2d 1313, 1315-1316 (1982).

Three dispositions are possible at the conclusion of this recovery hearing. If the applicant proves that he is no longer dangerous, he is discharged and the underlying criminal indictment or information is quashed. Ch. 38, §105-9. If he does not sustain his burden, on the other hand, he is simply returned to the Department. If, as a matter of a middle ground, the court entertains doubts as to the applicant's full recovery, it may conditionally release him under such supervision as will protect the public. Id.; People v. Whitney, 33 Ill. App. 3d 729, 338 N.E.2d 233 (1975). [That conditional release may be revoked, however, upon proof -- during a probation-revocation-style hearing -- that the person has violated a condition of his release. Ch. 38, §105-9; People v. Davis, 127 Ill. App. 3d 49, 468 N.E.2d 172 (1984).]

The recovery petition under Section 105-9, as just discussed, is the sexually dangerous person's primary "ticket" to release from his commitment. The Department of Corrections is

permitted, but not required, to seek the person's conditional release upon his suggested recovery. Ch. 38, §105-10. The person's commitment to the Department of Corrections, nevertheless, is primarily dependent upon his ability to prove his recovery and is thus truly indeterminate in length.[4]

The sexually-dangerous-person process in Illinois, as just discussed, is the process in which the petitioner found himself entangled. That process is legislatively branded civil in nature and seemingly designed to effect treatment of a sex-related mental disorder. Nevertheless, it is clear that the process is very much related to a formal criminal prosecution since it can arise only upon a criminal accusation, follows procedures much like a criminal trial and results in a commitment to the Department of Corrections, a commitment different from an Illinois criminal sentence only in being indeterminate.

---

[4]The average length of commitment of a sexually dangerous person is not documented. The case law informs, however, of commitments of substantial length. Eg., People v. Thingvold, 113 Ill. App. 2d 479, 251 N.E.2d 553 (1969) (six years); People v. Parrott, 438 N.E.2d 1313 (seven years); People v. Sweeney, 114 Ill. App. 2d 81, 251 N.E.2d 897 (1969) (eight years); People v. Shiro, 287 N.E.2d 708 (ten years); People v. Capoldi, 37 Ill. 2d 11, 225 N.E.2d 634 (1967) (fourteen years) and People v. Sly, 82 Ill. App. 3d 742, 403 N.E.2d 72 (1980) (fourteen years).

The range of non-extended criminal sentences for the most serious sex offenses in Illinois, on the other hand, is from six to thirty years [Ill. Rev. Stat. ch. 38, §§12-14(c),

(Footnote Continued)

B. SINCE THE ILLINOIS SEXUALLY-DANGEROUS-PERSON PROCEEDING IS SO RELATED TO A FORMAL CRIMINAL PROSECUTION, INVOLVES A DISTINCT ADJUDICATION OF DANGEROUSNESS, AND RESULTS IN AN INDEFINITE COMMITMENT TO A PENAL INSTITUTION, PRECEDENTS OF THIS COURT DEMAND THAT THE PRIVILEGE AGAINST SELF-INCRIMINATION BE HELD APPLICABLE TO THAT PROCEEDING.

This Honorable Court has not previously addressed the Illinois Sexually Dangerous Persons Act, the procedures of which have been discussed in detail at Part A above. Thus the Court has had no occasion to determine the adequacy of the procedural rights granted to an Illinois respondent in a proceeding under the Act nor to address the precise question presented here regarding the applicability of the Fifth Amendment privilege against self-incrimination in that proceeding. Decisions of this Court regarding similar statutes and similar proceedings, however, compel the conclusion that the privilege is indeed applicable and was improperly denied the petitioner in the court below. That conclusion, in turn, is supported by specific statements of this Court on the Fifth Amendment.

(Footnote Continued)
1005-8-1(a)(3) (1983)] with day-for-day credit for good time [Ill. Rev. Stat. ch. 38, §1003-6-3(a)(2) (1983)].

This Court has considered "sexual psychopath" statutes like the Illinois Sexually Dangerous Persons Act in some detail on at least three occasions. In Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940), the Court considered a vagueness challenge to Minnesota's Sexual Psychopathic Personality Law. Twenty-seven years later, in Specht v. Patterson, 386 U.S. 605 (1967), a habeas corpus petitioner challenged the lack of a hearing and a right of confrontation in hearings under the Colorado Sex Offenders Act. Finally, in 1972, the Court considered equal-protection challenges to the procedures involved in Wisconsin's Sex Crimes Act. Humphrey v. Cady, 405 U.S. 504 (1972).

The statutes involved in the three cases differed in some respects. Minnesota's statute contemplated a prosecutor's filing a petition against a person alleged to have a "psychopathic personality" as defined in the statute. This filing would be followed by a commitment hearing in which psychiatrists would participate and at which the "patient" would be represented by counsel and could call witnesses. Under the Colorado statute in Specht, a convicted sex offender would be examined by psychiatrists. The psychiatric reports would be filed with the court, which would then, without further hearing, determine whether the offender should be sentenced to the indefinite term of from one day to life under the Act. The Wisconsin procedure

considered in Humphrey was also a post-conviction procedure, one which was triggered by the trial court's finding a sexual-excitement motivation for the crime. That finding would be followed by examination of the defendant and a hearing on the need for treatment of the offender's "aberrations". If treatment was needed, the defendant would be committed to the Department of Public Welfare for a period equal to the maximum sentence for his crime -- a period which could be extended indefinitely in five-year intervals if the defendant remained dangerous.

Though the statutes differed, the Court was uniformly concerned with possible abuses and with the deprivation of fundamental rights. The Court upheld the Minnesota statute on its face but, in doing so, assumed that the substantial rights of the persons charged would be adequately safeguarded at every stage of the proceeding. Pearson v. Probate Court, 309 U.S. at 276-277. In Humphrey v. Cady, the Court noted the substantial nature of the petitioner's claims and found that they warranted an evidentiary hearing. Of particular concern to the Court was the allegation that the procedural requirements of the Sex Crimes Act differed significantly from the state's requirements for mental-health commitments even though the processes were much the same, or the former more onerous, in result. In the interim, in Specht v. Patterson, the Court rejected Colorado's contention that its Sex Offenders Act was merely a sentencing procedure.

The Act, according to the Court, contemplated a new finding of fact beyond the conviction and a radically different punishment of indeterminate length. Citing and approving the decision in United States ex rel. Gerchman v. Maroney, 355 F.2d 302 (3d Cir. 1966), the Court noted that the defendant was entitled to the "full panoply" of procedural protections which due process guaranteed in state criminal proceedings, "all those safeguards which are fundamental rights and essential to a fair trial". Specht v. Patterson, 386 U.S. at 609-610.

Taken together, these three decisions of the Court demonstrate that sexual-psychopath statutes are so serious in character and so open to potential abuse as to demand full procedural protection for the persons brought within their operation. "[P]artial or niggardly" protections are inadequate, especially if they fall short of protections present in simple mental-health commitments or fail to deter potential abuse. The decisions thus compel the conclusion that the Fifth Amendment's privilege against self-incrimination is applicable in Illinois' sexual-psychopath proceeding.

That proceeding, it must be noted, is open to the abuse feared by this Court in Pearson v. Probate Court. A prosecutor -- the only party who can initiate a dangerousness proceeding -- may confront an individual who, despite a proved or unproved record of prior criminal activity, can be charged only

with a misdemeanor offense and punished only with a short term of imprisonment. By pursuing a sexually-dangerous-person commitment instead, the prosecutor can greatly increase the offender's potential incarceration. Then too, a prosecutor may have a case which, for whatever reason -- problems with the witnesses or the like -- will be difficult to prove beyond a reasonable doubt. That problem can be avoided with a sexual-dangerousness action, one in which the prosecutor can compel psychiatric examinations and then use the psychiatrists, rather than witnesses to the underlying offense, to make its case. These potential abuses of the Sexually Dangerous Persons Act, especially the latter, can be minimized only by applying the privilege against self-incrimination to proceedings under the Act. Application of the privilege would make difficult the prosecutor's pursuing an adjudication of sexual dangerousness to avoid problems with his criminal prosecution.

The proceeding under the Sexually Dangerous Persons Act, like the proceedings reviewed in Specht and Humphrey, also involves the distinct finding of a person's sexual dangerousness and a radically different form of incarceration of indeterminate length. Thus, like the proceedings previously reviewed, it warrants the "full panoply" of procedural protections. The privilege against self-incrimination is truly a fundamental right and essential to a fair trial -- being, in the words of this

Court, the "essential mainstay" of the accusatorial system [Malloy v. Hogan, 378 U.S. at 7-8, quoting Rogers v. Richmond, 365 U.S. 534, 541 (1961)] and one of the basic "principles of a free government" [Id. at 9, quoting Boyd v. United States, 116 U.S. 616, 632 (1886)].[5]

The conclusion that the privilege against self-incrimination should be applicable in Illinois' sexually-dangerous-person proceeding does not depend alone upon this Court's rulings in regard to similar sex-offender legislation. It is instead bolstered by a consideration of other Fifth Amendment jurisprudence, cases considering the types of proceedings in which the privilege must apply.

Foremost among those cases is In re Gault, 387 U.S. 1 (1967). The Court, having previously held the privilege applicable in proceedings as disparate as bankruptcy [McCarthy v. Arndstein, 266 U.S. 34 (1924)], contempt [Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911)] and forfeiture [Boyd v. United States, 116 U.S. 616 (1886)], in Gault extended it to juvenile-delinquency proceedings. After tracing the purposes and

---

[5]Indeed, its importance in the context of involuntary commitments is no better underscored than in the mental-health-commitment statutes of Illinois which require that an examining psychiatrist inform his subject that the subject is not obliged to speak. Ill. Rev. Stat. ch. 91½, §3-208 (1983).

language of the privilege, the Court noted that "[i]t would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children." Gault, 387 U.S. at 47. The state argued that juvenile proceedings were "civil" and not "criminal" in nature and thus that the privilege should not apply. That argument met the Court's quick reply:

> It would be entirely unrealistic to carve out of the Fifth Amendment all statements by juveniles on the ground that these cannot lead to "criminal" involvement. In the first place, juvenile proceedings to determine "delinquency," which may lead to commitment to a state institution, must be regarded as "criminal" for purposes of the privilege against self-incrimination. To hold otherwise would be to disregard substance because of the feeble enticement of the "civil" label-of-convenience which has been attached to juvenile proceedings. Indeed, in over half of the States, there is not even assurance that the juvenile will be kept in separate institutions, apart from adult "criminals." In those States juveniles may be placed in or transferred to adult penal institutions after having been found "delinquent" by a juvenile court. For this purpose, at least, commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called "criminal" or "civil." And our Constitution guarantees that no person shall be "compelled" to be a witness against himself when he is threatened with deprivation of his liberty--a command which this Court has broadly applied and generously implemented in accordance with the teaching of the history of the privilege and its great office in mankind's battle for freedom.

Id. at 49-50 (footnotes omitted).

This Honorable Court later quoted Gault with approval in Estelle v. Smith, 451 U.S. 454 (1981). At issue in that case was

whether a psychiatrist's testimony at a capital sentencing hearing regarding the defendant's "future dangerousness" violated the Fifth Amendment privilege against self-incrimination where 1) the testimony was based upon the defendant's statements to the psychiatrist during an examination and where 2) that examination was not preceded by warnings of the defendant's right to silence. The first inquiry, according to the Court, and the one of greatest import here, was the applicability of the privilege itself. Quoting Gault, the Court noted that the applicability of the privilege did not turn upon the type of proceeding involved but rather "upon the nature of the statement or admission and the exposure which it invites." Id. at 462. The defendant's statements, remarked the Court, could potentially result in the ultimate penalty of death. The Fifth Amendment privilege therefore applied since it protected the defendant from being a "'deluded instrument' of his own execution" as well as a "deluded instrument of his own conviction". Id. at 462, quoting Culombe v. Connecticut, 367 U.S. 568, 581 (1961). This conclusion was not affected, in the Court's judgment, by the fact that the defendant's statements were made in the context of a psychiatric examination inasmuch as that examination was not made for a neutral purpose and was not a response to psychiatric evidence introduced by the defendant. Id. at 465-466.

Taken together or separately, In re Gault and Estelle v. Smith are strong authority for the proposition that the privilege against self-incrimination should apply in the Illinois sexually-dangerous-person proceeding. Both cases caution against unthinking reliance upon procedural labels, especially the "'civil' label-of-convenience", attached to particular proceedings. The final result of the proceedings instead must be examined. As to the sexually dangerous person, that end result is the total deprivation of liberty. The person so adjudicated, as noted above, is committed to an institution. Indeed, that institution is not a mental health facility but is instead a maximum-security institution of the Department of Corrections. Like the world of the committed juvenile in Gault, the person's world becomes "a building with whitewashed walls, regimented routine and institutional hours". Gault, 387 U.S. at 27, quoting Holmes' Appeal, 379 Pa. 599, 616, 109 A.2d 523, 530 (1954) (Musmanno, J., dissenting). His world is peopled by not only treating psychiatrists but also security personnel and persons serving sentences for formal crimes. His stay there is indeterminate in length but can far exceed the length of time spent by a convicted sex offender either there or in a less onerous penal facility. His commitment to such an institution for such a period of time must be considered criminal for purposes of the Fifth Amendment regardless of any procedural

label attached. See in this regard Haskett v. State, 255 Ind. 206, 263 N.E.2d 529 (1970), which extends the privilege to the state's criminal-sexual-psychopath proceeding, in part because of the psychopath's indefinite term of institutional commitment.[6]

The final result of the sexually-dangerous-person proceeding is not limited to the indefinite commitment to a penal institution as just discussed. The dangerousness adjudication also "invites exposure" to a serious societal stigma. At the close of the proceeding against him, the committed person is labeled not only as mentally disordered but also as one with propensities to the commission of sex offenses. He is, in precise terms, "sexually dangerous". That label is applied in a public proceeding. It can hardly be contested that the label makes him a pariah among his peers. See United States ex rel. Stachulak v. Coughlin, 520 F.2d 931, 936 (7th Cir. 1975), cert. denied, 424 U.S. 947 (1976) (addressing stigma attached to sexually-dangerous-person label) and People v. Burnick, 14 Cal. 3d 306, 121 Cal. Rptr. 488, 535 P.2d 352, 361-362 (1975) (addressing the "twin marks of mental and sexual abnormality"

---

[6]The court also focused on the fact that the proceeding was suggested to be criminal by the legislature and arose only in the context of a criminal prosecution.

attaching to adjudication as a "mentally disordered sex offender").

Examination of the precedents of this Court thus compels the conclusion that the privilege against self-incrimination must be applicable in an Illinois sexually-dangerous-person proceeding. That proceeding, relating closely to a prosecution for crime, calling for a distinct finding of sexual dangerousness and leading to an indefinite commitment to a penal institution, is within the scope of prior decisions addressing similar statutes. Those decisions, looking to the seriousness of the statutes and the potential for their abuse, call for a "full panoply" of procedural protections, including, of necessity, the Fifth Amendment privilege. Similarly, looking at the nature and result of the sexually-dangerous-person proceeding, it must be concluded that the proceeding is "criminal" in nature for purposes of the privilege under the specific Fifth-Amendment cases of this Court.

C. THE ILLINOIS SUPREME COURT'S DECISION THAT THERE IS NO FIFTH-AMENDMENT PRIVILEGE IN SEXUALLY-DANGEROUS-PERSON PROCEEDINGS CANNOT STAND ON ITS OWN TERMS INASMUCH AS IT FOCUSES ONLY ON THE "CIVIL" LABEL GIVEN THE PROCEEDING AND TOTALLY MISPERCEIVES THE VARIOUS INTERESTS INVOLVED IN THE PROCESS.

Throughout the trial- and appellate-court processing of his case, the petitioner argued -- as he has above -- that the Fifth Amendment privilege against self-incrimination applied in the sexually-dangerous-person proceeding in which he was involved. Though accepted by the intermediate court of review, the contention was flatly rejected by the Supreme Court of Illinois. That court's ruling, though, cannot survive analysis even on its own terms and thus must be rejected by this Honorable Court.

In finding the privilege inapplicable in a sexual-dangerousness proceeding, the Illinois Supreme Court focused on the "civil" nature of the proceedings, both as announced in prior case law and as demonstrated in the supposed treatment purpose of the Act. People v. Allen, 107 Ill. 2d 91, 481 N.E.2d 690, 695 (1985) (J.A. 46). That focus was totally inappropriate -- in a number of respects.

The focus on the "civil" label attached to the sexual-dangerousness proceeding, first of all, flies in the face of this Court's pronouncements on the subject. Specht v. Patterson, 386 U.S. 605 (1967), discussed at Part B above, could hardly be plainer in according fundamental rights and the essentials of a fair trial to the subject of a sexual-psychopath proceedings (Id. at 609-610) whether that proceeding is "denominated civil or criminal" (Id. at 608). In re Gault, 387 U.S. 1 (1967), too, cautions against disregarding substance

"because of the feeble enticement of the 'civil' label-of-convenience" attached to some proceedings. Id. at 50. Simply put, the "substance" of the sexually-dangerous-person proceeding is the respondent's indeterminate commitment to a penal institution. The "civil" label affixed by the legislature and repeated by the courts as to this proceeding cannot hide the simple fact that "within the context of this legislation, forced hospitalization is forced incarceration". Note, The Plight of the Sexual Psychopath: A Legislative Blunder and Judicial Acquiescence, 41 Notre Dame Law. 527, 556 (1965-66).

The Illinois Supreme Court's classifying the sexual-dangerousness proceeding as civil is no more justified by its reference to the supposed treatment purpose of the process. Legislation pertaining to the sexual psychopath, such as Illinois' Article 105 proceeding, does have a thread of therapeutic purpose and does in part implement the state's parens patriae authority to protect and care for the mentally ill. But sexual-psychopath statutes, particularly as they refer to the subject's present or future dangerousness to others, also have a strong police power basis and a strong purpose to protect society. Indeed the latter may predominate. See, e.g., Donaldson v. O'Connor, 493 F.2d 507, 524 (5th Cir. 1974), vacated on other grounds, 422 U.S. 563 (1975) ("heavy police power emphasis" in confinement of sex offenders); Note, Out of Tune

With The Times; The Massachusetts SDP Statute, 45 B.U.L. Rev. 391, 399 (1965) (sexual-psychopath statutes "almost always" upheld on police power theory).[7]

That police-power purpose of institutionalizing the dangerous person to protect society comes through clearly in the Illinois procedure. The person is confined not in a mental-health facility -- an institution thought of for treatment -- but rather in a penal facility -- an institution synonymous with incarceration. Cf. French v. Blackburn, 428 F.Supp. 1351 (M.D. N.C. 1977), aff'd, 443 U.S. 901 (1979) (Mem.) (detention of a mental-health patient was unlike confinement since the commitment statute specified that no jail cell be used). The sexually dangerous person in Illinois is committed not only with others similarly adjudicated but also with persons committed for formal crimes. Cf. Sas v. State of Maryland, 295 F.Supp. 389 (D. Md. 1969), aff'd sub nom. Tippett v. State of Maryland, 436 F.2d 1153 (4th Cir. 1971), cert. dismissed as improvidently granted sub nom. Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972) (defective-delinquent statute thought

---

[7]One of the psychiatrists involved in this case pointedly commented that, in his judgment, Department officials probably would be more concerned with ensuring that the committed person was no longer dangerous to society than with his being relieved of his disorder (R.134-135).

civil in nature since adjudicated persons were segregated in their own institution). That commitment is for an indeterminate term, lasting until the dangerous person can prove, on his own motion, that he has recovered. There is no provision for periodic review. Moreover, even the person's guardian -- the Department of Corrections -- is not required to take action to demonstrate his recovery. Compare in this regard Illinois' provisions regarding a "true" mental-health commitment -- provisions requiring, inter alia, initial commitments not to exceed 60 days, additional commitment in increments of 180 days, the prompt filing of a treatment plan and other affirmative action by the treatment-facility director. Ill. Rev. Stat. ch. 91½, §§3-813, 3-814 (1983).

All of this makes clear that the Illinois Supreme Court's reference to the treatment purpose of the Sexually Dangerous Persons Act is unjustifiable. Indeed, as a court examining the Act has declared, reference to the Act's purpose to treat and cure the committed person is "archaic" since "[a]ll too often the promise of treatment has served only to bring an illusion of benevolence to what is essentially a warehousing operation for social misfits." United States ex. rel. Stachulak v. Coughlin, 520 F.2d 931, 936 (7th Cir. 1975), cert. denied, 424 U.S. 947

(1976) quoting Cross v. Harris, 135 U.S. App. D.C. 259, 418 F.2d 1095, 1107 (1969).[8]

In ruling the Fifth Amendment privilege against self-incrimination inapplicable to the sexually-dangerous-person proceeding, the Illinois Supreme Court did not stop with reference to the "civil" nature of the proceeding, as just discussed. It went on to find that its ruling was supported by Mathews v. Eldridge, 424 U.S. 319 (1976), which "set out the factors relevant to the evaluation of a procedural due process claim". Allen, 481 N.E.2d at 695. The court then examined the three factors set forth in Mathews v. Eldridge and concluded that the test "totally support[ed]" its holding that the privilege did not apply. Id. at 695-696. Even if the test of Mathews v. Eldridge was properly utilized (but see Part B, supra), it is clear that the Illinois Supreme Court grossly miscalculated in examining the interests involved.

---

[8]The Illinois court's reference to a treatment purpose of the Act is also undercut by two other facts. First, there is no consensus that sexual psychopaths can be treated at all. See Note, The Plight of the Sexual Psychopath: A Legislative Blunder and Judicial Acquiescence, 41 Notre Dame Law. 527, 552-553 (1965-66).

Then, too, no person can apply for the treatment provided by the Act. The treatment is instead applied upon petition of the prosecutor. Why treatment should be afforded only the adjudicated and not the volunteer is a mystery, especially

(Footnote Continued)

The court began, it should be noted, by conceding that the private interest involved in the case was "great". Id. at 695. That concession was necessary. The sexually-dangerous-person proceeding, as noted, involves an indeterminate commitment to a penal institution -- a "massive curtailment of liberty" of itself [Humphrey v. Cady, 405 U.S. 504, 509 (1972)] aggravated by its indeterminancy [see People v. Burnick, 14 Cal. 3d 306, 121 Cal. Rptr. 488, 535 P.2d 352, 360 (1975)] and by the possibility that it will exceed the sentence of a formally convicted sex offender [see Stachulak v. Coughlin, 520 F.2d at 936]. The proceeding also involves the double-barrelled stigma of being labeled both mentally and sexually disordered. People v. Burnick, 535 P.2d at 362; Stachulak v. Coughlin, 520 F.2d at 936. The court's concession of a "great" private interest was thus no overstatement.

The court immediately continued, however, that the second factor of Mathews v. Eldridge -- "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards" -- favored exclusion of the privilege against self-incrimination. The proceeding already encompassed "numerous

---

(Footnote Continued)
compared to the "true" mental-health procedure which typically contemplates voluntary commitments.

safeguards ensuring reliability", according to the court, and the privilege would add little more since it is "not primarily concerned with reliability". Allen, 481 N.E.2d at 695-696. That calculation, though, ignores more than it considers. As this Court noted in Gault, 387 U.S. at 44-45, reliability is a concern of the privilege since "a person, especially one of defective mentality or peculiar temperament, may falsely acknowledge guilt." The possibility of a false acknowledgement of guilt certainly exists in the sexually-dangerous-person proceeding especially since, by definition, the proceeding involves persons alleged to have a mental disorder. The proceeding, additionally, involves inquiry into matters of a sexual nature -- a topic which, by common knowledge, invites a range of human responses from feigned ignorance to sophomoric bragging to outright lying. Given this real possibility of false statements, the remaining procedural safeguards of the proceedings -- the right to a jury, the requirement of proof beyond a reasonable doubt and the right to confrontation -- are simply inadequate. Regardless of the standard of proof applied, the composition of the fact-finder or the thoroughness of cross-examination, a false acknowledgement of sexual dangerousness almost certainly will result in an adjudication against the respondent.

The Illinois Supreme Court's miscalculation of the third factor of Mathews v. Eldridge is as obvious as that of the second

factor just discussed. In this regard, the court noted that "the State has a substantial interest in treating as well as protecting the public from sexually dangerous persons, an interest which would be almost totally thwarted by a strict application of the self-incrimination privilege in such proceedings." Allen, 481 N.E.2d at 696. While the State's interest in the matter is immediately apparent, the near impossibility of advancing that interest if the privilege is applied is not. It must be recalled that the sexual-dangerousness proceeding looks, in significant part, to proof of 1) the respondent's having criminal propensities toward sex offenses and 2) his having demonstrated those propensities. Ill. Rev. Stat. ch. 38, §105-1.01 (1981). Those elements can be proved objectively and without the aid of a psychiatrist, especially since the statute permits, if not contemplates, proof of the respondent's prior criminal activity (ch. 38, §105-5). The dangerousness proceeding, to be sure, also involves proof of the respondent's "suffering from a mental disorder" in existence for a year or more. It is to the proof of this element that the privilege against self-incrimination might be considered burdensome. But, as this Court has noted, it is appropriate to look to a state's procedures for involuntarily committing others for reasons of mental health when judging the procedures for committing sexual psychopaths, defective delinquents or the like.

See Humphrey v. Cady, 405 U.S. 504 (1972); Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1971) (dismissing certiorari as improvidently granted). And Illinois, it must be noted, demands that the person being examined for possible involuntary commitment be informed of his right to silence. Ill. Rev. Stat. ch. 91½, §3-208 (1983). It enacted that requirement deliberately, as "(e)xperience in the public and private sectors ha[d] shown that application of the privilege against self-incrimination [did] not seriously impair the state's ability to achieve the valid objectives of civil commitment." Matter of Rizer, 87 Ill. App. 3d 795, 409 N.E.2d 383, 386 (1980), quoting Governor's Commission for the Revision of the Mental Health Code of Illinois. This blunt statement in the area of civil commitment certainly undercuts any claim that application of the privilege would undermine the sexually-dangerous-person proceeding and its call for proof of the respondent's mental condition. For this reason and because the remaining elements of sexual dangerousness can be otherwise proved, the Illinois Supreme Court was simply wrong in stating (Allen, 481 N.E.2d at 696) that "[i]f a defendant is allowed to refuse to answer questions asked during a psychiatric examination then it would be

nearly impossible for the State to determine whether or not the defendant was sexually dangerous."[9]

It is clear, then, that the Supreme Court of Illinois grievously erred in its analysis of the three-factor test of Mathews v. Eldridge: it only grudgingly conceded the private interest, miscalculated the risk of an erroneous deprivation of that interest, and overstated the government's interest in proceeding without the sought-after safeguard. That three-factor test provided no support for its rejection of the privilege against self-incrimination in a sexual-dangerousness proceeding. The initial rejection of that privilege, in its own right, was mistaken since it focused only on the deceptive "civil" label and treatment orientation ascribed to the dangerousness proceeding. This Honorable Court must conclude, as a result, that the Illinois court's rejection of the privilege cannot be sustained.

---

[9]This Court's ruling in Estelle v. Smith, 451 U.S. 454 (1981) underscores the error of the Illinois Supreme Court. Since a defendant could consent to or request a dangerousness examination or put his mental state in issue and since the State could prove dangerousness without resort to psychiatric experts by showing the personal background of the defendant and the circumstances of his crime, the Court was confident that its application of the privilege against self-incrimination would "not prevent the State in capital cases from proving the defendant's future dangerousness as required by statute." 451 U.S. at 472.

D. SINCE THE PRIVILEGE AGAINST SELF-INCRIMINATION APPLIES TO THE SEXUALLY-DANGEROUS-PERSON PROCEEDING, SINCE THE PETITIONER WAS NOT WARNED OF THAT PRIVILEGE BEFORE HIS CUSTODIAL EXAMINATION BY THE APPOINTED PSYCHIATRISTS, AND SINCE THE PSYCHIATRISTS BASED THEIR OPINIONS UPON THE PETITIONER'S UNWARNED STATEMENTS TO THEM, THE PROSECUTION COULD NOT PROPERLY INTRODUCE THE PSYCHIATRIC OPINIONS AGAINST THE PETITIONER.

In presenting his case to the Illinois trial court and the courts of review, the petitioner insisted that the privilege against self-incrimination applied to his sexually-dangerous-person proceeding. Having done so, he went on to argue that the appointed psychiatrists could not testify against him inasmuch as their testimony was based upon his statements to them and inasmuch as those statements, in turn, had not been preceded by warnings regarding the privilege. He cited this Court's decision in Estelle v. Smith, 451 U.S. 454 (1981), for that latter proposition. The appellate court agreed. People v. Allen, 123 Ill. App. 3d 669, 463 N.E.2d 135 (1984). The Illinois Supreme Court had no occasion to reach the point, however. Having concluded that no privilege of silence existed in the proceeding, the court could dismiss Estelle and its call for warnings of that privilege. People v. Allen, 107 Ill. 2d 91, 481 N.E.2d 690, 696 (1985).

The court's conclusion regarding the applicability of the privilege must be set aside, as argued at Parts B and C above. As that is done, Estelle again comes to the forefront in petitioner's request for relief -- for obvious reasons.

In Estelle, this Court considered the admissibility of a psychiatrist's opinion of a capital defendant's future dangerousness. Specifically, the Court inquired regarding a Fifth Amendment violation since that opinion was based upon an examination which had not been preceded by advice of the defendant's right to silence.

The Court's first step, as noted above, was determining the applicability of the Fifth Amendment to the case. Estelle, 451 U.S. at 462-463. Having concluded that the privilege of silence did apply, the Court addressed the other contentions of the parties. The State's claim that the defendant's statements to the psychiatrist during the exam were nontestimonial in nature was quickly rejected -- the Court finding that the psychiatrist based his opinion upon the substance of the statements and not upon his mere observation of the defendant when the statements were made. Id. at 463-465. Also rejected were the State's claims that the examination had been neutral in purpose, much like a competency examination, and merely responsive to a psychiatric issue raised by the defendant himself. In this regard, the Court noted both that the psychiatrist had gone beyond

establishing the defendant's fitness for trial to the decidedly adverse purpose of calculating his future dangerousness and also that the State had then affirmatively used the psychiatric calculation in making its case even though the defendant had offered no psychiatric evidence of his own. Id. at 465-466.

The Court in Estelle continued its analysis of the Fifth Amendment claim, importantly for the issue presented here, by considering the psychiatrist's failure to advise the defendant of his rights prior to the examination. The Court quoted its decision in Miranda v. Arizona, 384 U.S. 436 (1966) in detail:

> In Miranda v. Arizona, the Court acknowledged that "the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." Miranda held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Thus, absent other fully effective procedures, a person in custody must receive certain warnings before any official interrogation, including that he has a "right to remain silent" and that "anything said can and will be used against the individual in court." The purpose of these admonitions is to combat what the Court saw as "inherently compelling pressures" at work on the person and to provide him with an awareness of the Fifth Amendment privilege and the consequences of forgoing it, which is the prerequisite for "an intelligent decision as to its exercise."

Estelle, 451 U.S. at 466-467 (citations omitted). The Court went on to find that the considerations calling for advice to the

accused prior to interrogation applied full-force to the psychiatric examination at issue in the case. The defendant, after all, was in custody at the time of the examination; the examiner, in turn, had gone beyond the neutral purpose of judging fitness to become like an agent of the State in its quest to prove the defendant's future dangerousness. Id. at 467. The defendant had not "voluntarily consent[ed] to the psychiatric examination after being informed of his right to remain silent and the possible use of his statements." Thus, the State could not make use of his statements to the psychiatrist to establish his future dangerousness. Id. at 468. The Court concluded:

> "Volunteered statements . . . are not barred by the Fifth Amendment," but under Miranda v. Arizona, supra, we must conclude that, when faced while in custody with a court-ordered psychiatric inquiry, respondent's statements to Dr. Grigson were not "given freely and voluntarily without any compelling influences" and, as such, could be used as the State did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them. (Citation omitted.) These safeguards of the Fifth Amendment privilege were not afforded respondent and, thus, his death sentence cannot stand.

Id. at 469 (footnote omitted).

The reasoning and result of Estelle must apply in the case at bar as to the petitioner's adjudication of sexual dangerousness. The Fifth Amendment applies to the proceeding at issue here as it did to the proceeding in Estelle.

The State of Illinois, the respondent here, like the State of Texas in Estelle, cannot rely upon any claim that the petitioner's statements to the examining psychiatrists were nontestimonial in nature. The examining experts here spoke to the petitioner on a number of subjects, especially past sexual incidents and the originally charged crime (R.117-118; R.131). They formed their opinions of the petitioner's sexual dangerousness, in substantial part, on the basis of what he said to them (R.94; R.135; J.A. 43). Indeed, the State has never suggested that the psychiatric opinions were not the result of the petitioner's words during his examinations.

Moreover, the examinations here, like those in Estelle, went beyond any neutral purpose and were not conducted in response to psychiatric evidence presented by the petitioner. The latter point is abundantly clear: the petitioner produced no evidence at all in the course of the proceeding. The first point is clear as well: the examining psychiatrists did not stop with establishing the petitioner's general mental condition. They instead went far beyond to address the crucial elements of the sexual-dangerous proceedings: the existence of an established mental disorder, propensities for the commission of sex offenses and demonstrations of those propensities. These points of inquiry were certainly adverse to the petitioner; their establishment

would lead to his adjudication and commitment as a sexually dangerous person.

The examinations in this case resembled those in Estelle in respects important to the final step in the Estelle analysis. The examinations here, first of all, were court-ordered; the petitioner here, like Smith in Estelle, was simply not at liberty to decide whether he should participate. The exams, additionally, were conducted while the petitioner was in custody. Sheriff's deputies took the petitioner -- in handcuffs (R.110) -- from the Peoria County Jail to the doctors and stood outside the door during the psychiatric interviews (R.248). The petitioner, once inside, was "not in the presence of [persons] acting solely in his interest". Estelle, 451 U.S. at 467, quoting Miranda v. Arizona, 384 U.S. at 469. Instead, he faced psychiatrists specifically charged with gathering information on his alleged sexual dangerousness. The psychiatric examinations, finally, were not preceded by any meaningful advice regarding the petitioner's right to remain silent and the possible use of statements made during the exams. As found by the Illinois Appellate Court [People v. Allen, 123 Ill. App. 3d 669, 463 N.E.2d 135, 137 (1984) (J.A. 25)], Dr. Colen gave no warnings at all while Dr. Beck intimated only that "anything [petitioner] might say would be or could be put into a letter that would be sent back to the Court" (R.127). The petitioner simply was not

meaningfully informed of his right to silence or the consequences of his speaking.

Analysis of the case at bar then, in light of Estelle, can lead to only one conclusion: the State was not free to use the psychiatric opinions of Drs. Colen and Beck in making its case of the petitioner's sexual dangerousness. The petitioner enjoyed the privilege against self-incrimination in the course of the proceeding against him. He was nevertheless required, while in custody, to take part in psychiatric examinations which were not preceded by advice of the right to silence and of the consequences of his speaking. The psychiatrists ultimately advanced opinions based upon statements made by the unadvised petitioner. Under these circumstances, introduction of the psychiatric opinions violated the petitioner's Fifth Amendment privilege against self-incrimination and cannot be approved.

CONCLUSION

The Illinois Supreme Court affirmed the petitioner's adjudication and commitment as a sexually dangerous person over his claim that his Fifth Amendment privilege against self-incrimination had been violated. For the reasons set forth in this brief, the court's ruling must be reversed.

Respectfully submitted,

ROBERT AGOSTINELLI
Deputy Defender

VERLIN R. MEINZ
*PETER A. CARUSONA
Assistant Defenders

Office of the State Appellate Defender
628 Columbus Street - Suite 308
Ottawa, Illinois 61350
(815) 434-5531

COUNSEL FOR PETITIONER

JEAN HERIGODT
Assistant Public Defender
6107 N. Sauganash
First Floor
Chicago, Illinois 60646
(312) 545-2953
OF COUNSEL

*Counsel of Record

APPENDIX A

Sexually Dangerous Persons Act, Article 105 of the Code of Criminal Procedure [Ill. Rev. Stat. ch. 38, §105-1.01, et seq. (1981)].

105-1.01. Sexually dangerous persons--Definition

§1.01. As used in this Act:

All persons suffering from a mental disorder, which mental disorder has existed for a period of not less than one year, immediately prior to the filing of the petition hereinafter provided for, coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children, are hereby declared sexually dangerous persons.

105-2. Jurisdiction

§2. Jurisdiction of proceedings under this Act is vested in the circuit courts in this State, for the purpose of conducting hearings for commitment and detention of such persons, as hereinafter provided.

105-3. Petition--Contents

§3. When any person is charged with a criminal offense and it shall appear to the Attorney General or to the State's Attorney of the county wherein such person is so charged, that such person is a sexually dangerous person, within the meaning of this Act, then the Attorney General or State's Attorney of such county may file with the clerk of the court in the same proceeding wherein such person stands charged with criminal offense, a petition in writing setting forth facts tending to show that the person named is a sexually dangerous person.

105-3.01. Civil nature of proceedings--Burden of proof--Procedure

§3.01. The proceedings under this Act shall be civil in nature, however, the burden of proof required to commit a defendant to confinement as a sexually dangerous person shall be the standard of proof required in a criminal proceedings of proof beyond a reasonable doubt. The provisions of the Civil Practice Act, and all existing and future amendments of that Act and modifications thereof and the Supreme Court Rules now or hereafter adopted in relation to that Act shall apply to all proceedings hereunder except as otherwise provided in this Act.

105-4. Examination by psychiatrist

§4. After the filing of the petition, the court shall appoint two qualified psychiatrists to make a personal examination of such alleged sexually dangerous person, to ascertain whether such person is sexually dangerous, and the psychiatrists shall file with the court a report in writing of the result of their examination, a copy of which shall be delivered to the respondent.

105-4.01. "Qualified psychiatrist"--Defined

§4.01. "Qualified psychiatrist" means a reputable physician licensed in Illinois to practice medicine in all its branches, who has specialized in the diagnosis and treatment of mental and nervous disorders for a period of not less than 5 years.

105-4.02. Psychiatric examination in counties less than 500,000--Costs

§4.02. In counties of less than 500,000 inhabitants the cost of the psychiatric examination required by Section 4 is a charge against and shall be paid out of the general fund of the county in which the proceeding is brought.

105-5. Jury trial, right to--Evidence

§5. The respondent in any proceedings under this Act shall have the right to demand a trial by jury and to be represented by counsel. At the hearing on the petition it shall be competent to introduce evidence of the commission by the respondent of any number of crimes together with whatever punishments, if any, were inflicted.

105-6. §6. Repealed by Laws 1955, p. 1144, eff. July 7, 1955.

105-7. Reserved.

105-8. Director of Corrections as guardian

§8. If the respondent is found to be a sexually dangerous person then the court shall appoint the Director of Corrections guardian of the person found to be sexually dangerous and such person shall stand committed to the custody of such guardian. The Director of Corrections as guardian shall keep safely the person so committed until the person has recovered and is released as hereinafter provided. The Director of Corrections as guardian shall provide care and treatment for the person committed to him designed to effect recovery. The Director may place that ward in any facility in the Department of Corrections or portion thereof set aside for the care and treatment of sexually dangerous persons. The Department of Corrections may also request another state Department or Agency to examine such patient and upon such request, such Department or Agency shall

also request another state Department or Agency to examine such patient and upon such request, such Department or Agency shall make such examination and the Department of Corrections may, with the consent of the chief executive officer of such other Department or Agency, thereupon place such patient in the care and treatment of such other Department or Agency.

105-9. Application showing recovery--Hearing--Discharge

§9. An application in writing setting forth facts showing that such sexually dangerous person or criminal sexual psychopathic person has recovered may be filed before the committing court. Upon receipt thereof, the clerk of the court shall cause a copy of the application to be sent to the Director of the Department of Corrections. The Director shall then cause to be prepared and sent to the court a socio-psychiatric report concerning the applicant. The report shall be prepared by the psychiatrist, sociologist, psychologist and warden of, or assigned to, the institution wherein such applicant is confined. The court shall set a date for the hearing upon such application and shall consider the report so prepared under the direction of the Director of the Department of Corrections and any other relevant information submitted by or on behalf of such applicant. If the patient is found to be no longer dangerous, the court shall order that he be discharged. If the court finds that the patient appears no longer to be dangerous but that it is impossible to determine with certainty under conditions of institutional care that such person has fully recovered, the court shall enter an order permitting such person to go at large subject to such conditions and such supervision by the Director as in the opinion of the court will adequately protect the public. In the event the person violates any of the conditions of such order, the court shall revoke such conditional release and recommit the person pursuant to Section 5-6-4 of the Unified Code of Corrections under the terms of the original commitment. Upon an order of discharge every outstanding information and indictment, the basis of which was the reason for the present detention, shall be quashed.

105-10. Conditional release--Petition--Revocation and re-commitment

§10. Whenever the Director finds that any person committed to him under this Act as now or hereafter amended, appears no longer to be dangerous but that it is impossible to determine with certainty under conditions of institutional care that such person has fully recovered, the Director of the Department of Corrections may petition the committing court for an order authorizing the conditional release of any person committed to him under this Act and the court may enter an order permitting such person to go at large subject to such conditions and such supervision by the Director as in the opinion of the court will

adequately protect the public. In the event the person violates any of the conditions of such order, the court shall revoke such conditional release and re-commit the person pursuant to Section 5-6-4 of the Unified Code of Corrections under the terms of the original commitment.

105-11. Partial invalidity

§11. If any provision of this Act, or the application of any provision to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

105-12. Custody transferred from Department of Public Safety to Director of Corrections

§12. Persons heretofore committed to the Department of Public Safety are deemed transferred and committed to the custody of the Director of Corrections.

Supreme Court, U.S.
FILED
FEB 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-5404

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TERRY B. ALLEN,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The Illinois Supreme Court

BRIEF FOR RESPONDENT

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROMA J. STEWART
Solicitor General, State of Illinois
MARK L. ROTERT
Chief, Criminal Appeals Division
SALLY L. DILGART*
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2570

Counsel for Respondent

* Counsel of Record

Printed by Authority of the State of Illinois (P.O. 33140—75—2-24-86)

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

I. Should the fifth amendment privilege against compulsory self-incrimination, made applicable to the states by the fourteenth amendment due process clause, be extended to commitment proceedings held under the Illinois Sexually Dangerous Persons Act to provide psychiatric care to mentally ill, sexually dangerous persons.

II. In light of *Miranda v. Arizona*, 384 U.S. 436 (1966), if the fifth amendment privilege does apply to those proceedings, can the protection nevertheless be waived without formal rights admonition by a counseled respondent during psychiatric examination.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW ..	i
TABLE OF AUTHORITIES	iv
OPINIONS AND JUDGMENTS BELOW	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT:	
I.	
THE ILLINOIS SEXUALLY DANGEROUS PERSONS ACT PROVIDES A CIVIL, INVOLUNTARY COMMITMENT ALTERNATIVE TO CRIMINAL PROSECUTION TO WHICH THE FIFTH AMENDMENT PRIVILEGE DOES NOT APPLY	7
A. In Both Purpose And Effect, The Act Provides A Medico-Legal Inquiry After Which Persons Suffering From Mental Disorders Are Committed For Psychiatric Care	11
B. The Fourteenth Amendment Due Process Clause Does Not Require A Privilege Against Self-Incrimination To Assure Fundamental Procedural Fairness In Sexually Dangerous Persons Proceedings	20
C. The Historical Fifth Amendment Values Of Freedom From Coercion And A Fair Balance Between The State And Its Individual Citizens Are Not Served By Extension Of The Privilege To A Mental Health Commitment Context	28

D. A Right To Silence During Psychiatric Examinations Would Thwart The Diagnostic And Treatment Purposes Of The Proceedings .. 33

II.

BECAUSE PSYCHIATRIC EXAMINATIONS DO NOT PRESENT THE INHERENTLY COERCIVE ATMOSPHERE CONDEMNED IN *MIRANDA v. ARIZONA*, 384 U.S. 436 (1966), ANY FIFTH AMENDMENT PRIVILEGE IS NOT SELF-EXECUTING AND MUST BE CLAIMED BY A COUNSELED EXAMINEE .. 35

CONCLUSION 39

APPENDIX

Menard Psychiatric Center's April 1983 Statistical Report ..... App. 1

TABLE OF AUTHORITIES

Cases	Page
Adams v. Maryland, 347 U.S. 179 (1954)	19
Addington v. Texas, 441 U.S. 418 (1979)	*passim*
Barefoot v. Estelle, 463 U.S. 880 (1983)	21, 24, 32
Baxstrom v. Herold, 383 U.S. 107 (1966)	13, 19
Baxter v. Palmigiano, 425 U.S. 308 (1976) ..	27, 30, 36, 37
California v. Byers, 402 U.S. 424 (1971) ...	19, 30, 32
Commonwealth v. Barboza, 387 Mass. 105, 438 N.E. 2d 1064, *cert. denied*, 459 U.S. 1020 (1982) ...	14, 38
Commonwealth ex rel. Finken v. Roop, 234 Pa. Super. 155, 339 A.2d 764 (1975), *cert. denied*, 424 U.S. 960 (1976)	34
Cross v. Harris, 418 F.2d 1095 (D.C. Cir. 1969)	13, 16, 17, 24
Culombe v. Connecticut, 367 U.S. 568 (1961)	31, 32, 33
Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), *vacated on other grounds*, 422 U.S. 563 (1975)	16, 24
Duncan v. Louisiana, 391 U.S. 145 (1968)	22
Estelle v. Smith, 451 U.S. 454 (1981)	*passim*
Fare v. Michael C., 442 U.S. 707 (1979) ..	26, 29, 36, 38
French v. Blackburn, 428 F.Supp. 1351 (M.D.N.C. 1977), *aff'd mem.*, 443 U.S. 901 (1979) ..	10, 15, 26
Gagnon v. Scarpelli, 411 U.S. 778 (1973)	25

Gardner v. Broderick, 392 U.S. 273 (1968) 8

Garner v. United States, 424 U.S. 648 (1976) .. 38

Gomes v. Gaughan, 471 F.2d 794 (1st Cir. 1973) . 13, 32

Hollis v. Smith, 571 F.2d 685 (2d Cir. 1978) 13, 30

Humphrey v. Cady, 405 U.S. 504 (1972) ... 13, 16, 17

In Re Field, 120 N.H. 206, 412 A.2d 1032 (1980) . 17

In Re Gault, 387 U.S. 1 (1967) ..... *passim*

In Re Matthews, 46 Or. App. 757, 613 P.2d 88 (1980) 28

In Re Ottolini, 73 Ill.App.3d 971, 392 N.E.2d 736 (1979) 36

In Re Winship, 397 U.S. 358 (1970) 21, 23, 25

Johnson v. Zerbst, 304 U.S. 458 (1938) 39

Kastigar v. United States, 406 U.S. 441 (1972) .. 19

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) 8, 11, 14, 17

Lefkowitz v. Turley, 414 U.S. 70 (1973) 19

Mahler v. Eby, 264 U.S. 32 (1924) 11

Malloy v. Hogan, 378 U.S. 1 (1964) 22, 29

Mathews v. Eldridge, 424 U.S. 319 (1976) .. 22, 27, 28, 29

McKeiver v. Pennsylvania, 403 U.S. 528 (1971) . *passim*

McNeil v. Director, Patuxent Inst., 407 U.S. 245 (1972) 10, 13

Michigan v. Tucker, 417 U.S. 443 (1974) 29, 31

Middendorf v. Henry, 425 U.S. 25 (1976) 8, 25, 26

Millard v. Harris, 406 F.2d 964 (D.C. Cir. 1968) . 13, 24

Minnesota v. Murphy, 465 U.S. 420 (1984) .. *passim*

Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940) 10, 14, 17, 22

Miranda v. Arizona, 384 U.S. 436 (1966) ... 27, 35-39

Morrissey v. Brewer, 408 U.S. 471 (1972) .. 22, 25, 27

Moss v. State, 539 S.W.2d 936 (Tex. Civ. App. 1976) 36

Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964) 19, 29, 31

Overholser v. Lynch, 288 F.2d 388 (D.C. Cir. 1961) (en banc), *rev'd on other grounds*, 369 U.S. 705 (1962) 17

Parham v. J.R., 442 U.S. 584 (1979) 22, 25, 32

Pate v. Robinson, 383 U.S. 375 (1976) 39

Patterson v. New York, 432 U.S. 197 (1977) ... 22

Paul v. Davis, 424 U.S. 693 (1976) 25

People v. Allen, 123 Ill.App.3d 669, 463 N.E.2d 135 (1984), *rev'd*, 107 Ill.2d 91, 481 N.E.2d 690 (1985) ..... *passim*

People v. Burkhart, 116 Ill.App.3d 708, 452 N.E. 2d 375 (1983) 12, 13, 16, 18

People v. Capoldi, 10 Ill.2d 261, 139 N.E.2d 776 (1957) 15, 27

People v. Chapman, 301 Mich. 584, 4 N.W.2d 18 (1942) 14, 17

People v. Fish, 36 Ill.2d 220, 221 N.E.2d 637 (1966) . 12

People v. Levy, 311 P.2d 897 (Cal. Ct. App. 1957) . 26

People v. Lindsey, 45 Ill.2d 115, 256 N.E.2d 808 (1970) 18

People v. Nastasio, 19 Ill.2d 524, 168 N.E.2d 728 (1960) 26

People v. Patch, 9 Ill.App.3d 134, 293 N.E.2d 661 (1973) 12

People v. Pembrock, 62 Ill.2d 317, 342 N.E.2d 28 (1976) 14, 27

People v. Pygott, 64 Ill.App.2d 284, 211 N.E.2d 382 (1965) 15

People v. Redlich, 402 Ill. 270, 83 N.E.2d 736 (1949) 12

People v. Sansone, 18 Ill.App.3d 315, 309 N.E.2d 733 (1974) 13, 15

People v. Shiro, 52 Ill.2d 279, 287 N.E.2d 708 (1972) 13, 18

People v. Sims, 382 Ill. 472, 47 N.E.2d 703 (1943) . 12, 14

People v. Sly, 82 Ill.App.3d 742, 403 N.E.2d 72 (1980) 17, 18

People v. Studdard, 51 Ill.2d 190, 281 N.E.2d 678 (1972) 18, 26

People v. Whitney, 33 Ill.App.3d 729, 338 N.E.2d 233 (1975) 12, 18

Pope v. United States, 372 F.2d 710 (8th Cir. 1967) (en banc), *vacated and remanded on other grounds*, 392 U.S. 651 (1968) 30

Rhode Island v. Innis, 446 U.S. 291 (1980) ... 37

Roberts v. United States, 445 U.S. 552 (1980) ... 36

Robinson v. California, 370 U.S. 660 (1962) .. 9, 10, 23

Rogers v. Richmond, 365 U.S. 534 (1961) 28

Rollerson v. United States, 343 F.2d 269 (D.C. Cir. 1964) 32, 34

Sas v. Maryland, 334 F.2d 506 (4th Cir. 1964), *on remand*, 295 F.Supp. 389 (D. Md. 1969), *aff'd sub nom. Tippett v. Maryland*, 436 F.2d 1153 (4th Cir. 1971), *cert. dismissed as improvidently granted sub nom. Murel v. Baltimore City Criminal Court*, 407 U.S. 355 (1972) 10, 15, 20, 25, 34

Schmerber v. California, 384 U.S. 757 (1966) .. 30, 31

Smith v. Francis, ____ U.S. ____, 106 S.Ct. 260, 88 L.Ed.2d 266 (1985) 9

Specht v. Patterson, 386 U.S. 605 (1967) 10, 13

State v. O'Neill, 274 Or. 49, 545 P.2d 97 (1976) .. 37, 38

State v. Whitlow, 45 N.J. 3, 210 A.2d 763 (1965) . 34

Taylor v. Best, 746 F.2d 220 (4th Cir. 1984) .. 33

Tehan v. United States ex rel. Shott, 382 U.S. 406 (1966) 27

Thornton v. Corcoran, 407 F.2d 695 (D.C. Cir. 1969) 37

Trop v. Dulles, 356 U.S. 86 (1958) (plurality opinion) 11

United States v. Albright, 388 F.2d 719 (4th Cir. 1968) 30, 34

United States v. Baird, 414 F.2d 700 (2d Cir. 1969), *cert. denied*, 396 U.S. 1005 (1970) 30

United States v. Byers, 740 F.2d 1104 (D.C. Cir. 1984) (en banc) 21, 33, 37, 38

United States ex rel. Gerchman v. Maroney, 355 F.2d 302 (3rd Cir. 1966) 13

United States v. Grunewald, 233 F.2d 556 (2d Cir. 1956), *rev'd*, 353 U.S. 391 (1957) 32

United States v. Mandujano, 425 U.S. 564 (1976) . 38

United States ex rel. Stachulak v. Coughlin, 520 F.2d 931 (7th Cir. 1975) 13

United States v. Wade, 388 U.S. 218 (1967) ... 37

United States v. Ward, 448 U.S. 242 (1980) ... 8, 11

Vitek v. Jones, 445 U.S. 480 (1980) 15

Williams v. Director, Patuxent Inst., 276 Md. 272, 347 A.2d 179 (Ct. App.), *cert. denied*, 425 U.S. 976 (1975) 19

Statutes and Regulations

7 Ill. Reg. 13496 (1983) 18

8 Ill. Reg. 14404 (1984) 18

8 Ill. Reg. 14501 (1984) 18

Ill. Rev. Stat. ch. 38, par. 105-1.01 (1981) ... 2, 11, 14, 24

Ill. Rev. Stat. ch. 38, par. 105-4 (1981) 26

Ill. Rev. Stat. ch. 38, par. 105-5 (1981) 16, 26, 27

Ill. Rev. Stat. ch. 38, par. 105-8 (1981) 17, 18

Ill. Rev. Stat. ch. 38, par. 105-9 (1963) 12

Ill. Rev. Stat. ch. 38, par. 105-9 (1973) 18

Ill. Rev. Stat. ch. 38, par. 105-9 (1981) 19

Ill. Rev. Stat. ch. 38, par. 105-10 (1981) 18, 24

Ill. Rev. Stat. ch. 38, par. 106-1 (1976) 19

Ill. Rev. Stat. ch. 38, par. 106-2 (1976) 19

Ill. Rev. Stat. ch. 38, par. 820, (1938) 12

Ill. Rev. Stat. ch. 38, par. 822.01 (1955) 12

Ill. Rev. Stat. ch. 91½, par. 1-119 (1979) 14, 15

Ill. Rev. Stat. ch. 111½, par. 6321 (1984) 13

Additional Authorities

Annot., 24 A.L.R.2d 350 (1952) 14

Annot., 34 A.L.R.3d 652 (1970) 14

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (3d ed. 1980) 11

Developments in the Law—Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190 (1974) 8, 13, 16, 39

Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975) 28

Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cin. L. Rev. 671 (1968) 31, 32, 33

McKay, *Self-Incrimination and the New Privacy*, 1967 Sup. Ct. Rev. 193 28

Model Penal Code (Proposed Official Draft 1962) .. 34

In The

Supreme Court of the United States

October Term, 1985

TERRY B. ALLEN,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The Illinois Supreme Court

BRIEF FOR RESPONDENT

OPINIONS AND JUDGMENTS BELOW

The decision of the Illinois Appellate Court, Third Judicial District, is reported in *People v. Allen*, 123 Ill.App.3d 669, 463 N.E.2d 135 (1984). A copy of the opinion has been included within the parties' joint appendix at pages 23-28. *Certiorari* was granted to review the decision of the Illinois Supreme Court in *People v. Allen*, 107 Ill.2d 91, 481 N.E.2d 690 (1985). A copy of that opinion may be found within the appendix at pages 41-52.

STATEMENT OF THE CASE

Petitioner Terry B. Allen was charged by bill of information in the Peoria County, Illinois circuit court for the crimes of deviate sexual assault and unlawful restraint of Christine Ray. The county state's attorney then petitioned the court to have Allen confined for psychiatric care pursuant to the Illinois Sexually Dangerous Persons Act, Ill. Rev. Stat. ch. 38, par. 105-1.01 to -12 (1981).[1] (J.A. 1-4). After a preliminary hearing on the information, at which the victim was not called to testify, the criminal charges were dismissed for want of probable cause. (J.A. 6; R. 8-12). Allen was then indicted for the same offenses and the petition was reinstated. (J.A. 7-8; R. C41).

When Allen and earlier appointed counsel were present in open court, the judge explained the procedure and rights under the Sexually Dangerous Persons Act. Allen indicated he understood the nature of those proceedings. Allen was then ordered to submit to two psychiatric examinations, and the names and addresses of the appointed physicians, as well as the dates and times of the scheduled examinations, were given to Allen and counsel in open court. (J.A. 5; R. 249-50, 261-62).

---

[1] The Illinois legislature has defined a sexually dangerous person as a person "suffering from a mental disorder, which mental disorder has existed for a period of not less than one year, immediately prior to the filing of the petition hereinafter provided for, coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities towards acts of sexual assault or acts of sexual molestation of children". Ill. Rev. Stat. ch. 38, par. 105-1.01 (1981).

Counsel did not attend those examinations, but one of the evaluating psychiatrists nevertheless "made sure that he [Allen] understood what the consequences were" before he began the examination. (J.A. 36; R. 251). Dr. Beck explained his role as court-appointed examiner rather than as personal physician, and Beck warned Allen that any disclosures could be reported to the court and counsel. (J.A. 36; R. 126-27). Beck found Allen to be "very cooperative" and concluded that Allen "wanted to be found sexually dangerous and did so because he felt it was a better alternative than a trial trying to be found not guilty". (J.A. 36-37). Dr. Colen similarly noted that Allen "wanted to be hospitalized to get help". (J.A. 34).

The psychiatrists conducted organic mental testing and mental status evaluations in their private offices to examine Allen's personal appearance, speech patterns, thought processes, hallucinations and delusions, emotional state, appetite and sleep disturbances, self-destructive tendencies, memory, concentration, orientation to time and place, ability to make calculations and to engage in abstract thought, judgment, and personal insight. (R. 85, 95-96, 126, 128). Family, medical, educational, employment and military histories were also solicited from Allen. (J.A. 33, 37). Finally, prior psychiatric hospitalizations and drug and alcohol usage were noted. (J.A. 33-34, 37-38). Allen reported psychotic auditory hallucinations and suicidal desires. He was diagnosed as psychotic, or "out of touch with reality", and suffering from a schizophrenia characterized by aggressive and abnormal behavior. (J.A. 34-35, 39; R. 96, 99, 101, 103, 130, 137-38).

Allen disclosed that he had engaged in forcible, deviant sexual behavior during street encounters since the age of ten. He acknowledged the same behavior with Christine Ray. Allen said he couldn't "stop this stuff". (J.A. 33, 37;

R. 131). Allen did not file a pre-hearing suppression motion or motion *in limine* to voice a constitutional objection to use of his statements at the hearing. At the bench hearing on the petition, however, these psychiatrists were allowed over defense objection to express only their medical opinions formulated from these interviews; Allen's statements were not permitted as evidence. (R. 89-90).

When called as the State's third witness, twenty-one year old Christine Ray related the events of October 11, 1982. Ray was a McDonald's waitress who had spoken to Allen inside the restaurant. (R. 144). After completing her duties, Ray entered her unlocked automobile to drive home. Allen, who had been concealed in the backseat, appeared and demanded in a "threatening" tone of voice that she drive him "to a romantic place—or else". (R. 145-46). At Allen's direction, Ray drove to the airport parking lot where Allen attempted intercourse with the clothed victim. He also forced her to perform fellatio. (R. 149-51, 153). Allen was arrested two days later when he returned to the same restaurant. (R. 158).

Allen did not testify or offer other evidence at the hearing. After finding Allen to be a sexually dangerous person, the circuit court judge ordered Allen's indeterminate confinement at the Menard Psychiatric Center. (J.A. 11). No subsequent attempt was made to pursue criminal prosecution on the indictment.

On direct appeal, a divided intermediate state appellate court reversed the finding upon the authority of *Estelle v. Smith*, 451 U.S. 454 (1981). *People v. Allen*, 123 Ill. App.3d 669, 463 N.E.2d 135 (1984). In its subsequent unanimous opinion, the Illinois Supreme Court concluded that the fifth amendment privilege does not insulate disclosures used to adjudicate a person's civil status as a

sexually dangerous person. Relying in part on this Court's decision in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the court considered Allen's liberty interest but concluded that the state's legitimate treatment purpose outweighed the minimal value of the privilege as a protection against erroneous decisionmaking. *People v. Allen*, 107 Ill.2d 91, 102, 481 N.E.2d 690 (1985). Statements made during forensic evaluations may not be used as evidence in any subsequent criminal prosecution, however. 107 Ill.2d at 104.

Petitioner obtained *certiorari* review of that decision on November 12, 1985.

SUMMARY OF ARGUMENT

I. The fifth amendment privilege against compulsory self-incrimination, enforceable against the states by incorporation into the fourteenth amendment due process clause, does not insulate disclosures offered as evidence in proceedings under the Illinois Sexually Dangerous Persons Act. Although the privilege may be claimed in any proceeding, the privilege does not offer any shield against civil liability. Proof of a respondent's mental disorder, dismissal of the pending criminal charge, and subsequent psychiatric care sufficiently distinguish these civil proceedings from the criminal trial for which the privilege was designed. Full protection of the respondent's fifth amendment privilege has been provided by immunity from subsequent criminal prosecution.

A. Announced legislative intent, legislative history, and the actual operation of the Act reveal a civil, mental

health commitment alternative to criminal prosecution. After the government proves a respondent's mental disorder and a demonstrated propensity to engage in certain types of sexual activity, the respondent is confined in a special mental health facility where he receives psychiatric care and regular progress evaluations until recovery is achieved. The pending criminal charge is dismissed, and statements to examining psychiatrists cannot be used to establish guilt in any future criminal prosecution. The Act accordingly provides an opportunity for psychiatric care in lieu of criminal prosecution.

B. Although the liberty deprivation associated with involuntary mental health commitment implicates the fourteenth amendment due process clause, the privilege is not required to assure fundamental procedural fairness in these proceedings. An individual's loss of personal freedom, and the possible stigma arising from adjudication, do not outweigh the state's compelling interest in providing psychiatric care to dangerous, mentally ill persons.

C. Extension of the fifth amendment to these proceedings would not promote the values which the privilege historically was designed to serve. In a medico-legal proceeding in which false disclosures have an independent clinical significance, the privilege is not needed to assure truthfulness of statement content. Indeed, Petitioner Allen neither alleged coercive practices nor claimed that his statements were in any way untrustworthy. Equally important, the desire to maintain a fair state/individual balance must yield when the State's access to the most reliable evidence of a respondent's mental state is threatened.

D. The fifth amendment privilege is the one procedural safeguard most likely to work a serious debilitating effect on these proceedings. Any right to silence would imper-

missibly deny the State the use of crucial evidence of respondent's mental state, thwart the diagnostic and treatment purposes of the proceeding, and thereby force the state to abandon any benefits of this mental health commitment alternative to criminal prosecution.

II. Even if the fifth amendment exclusionary rule extends to these proceedings, examining psychiatrists are not required to give *Miranda v. Arizona*, 384 U.S. 436 (1966) admonitions before forensic evaluations. In the context of these proceedings, the privilege is not self-executing and must be claimed during the examination. Equally important, Petitioner Allen, represented by counsel, affirmatively knew that his disclosures would be used to adjudicate his status as a sexually dangerous person.

ARGUMENT

I.

THE ILLINOIS SEXUALLY DANGEROUS PERSONS ACT PROVIDES A CIVIL, INVOLUNTARY COMMITMENT ALTERNATIVE TO CRIMINAL PROSECUTION TO WHICH THE FIFTH AMENDMENT PRIVILEGE DOES NOT APPLY.

The fifth amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any *criminal case* to be a witness against himself. . ." (emphasis supplied). Respondent recognizes that the privilege may be claimed in any proceeding. Moreover, when assessing the availability of the privilege in a proceeding, it is appropriate to consider "the nature of the statement or admission and the *exposure which it invites*". *In Re Gault*, 387 U.S. 1, 49 (1967) (emphasis supplied), as reaffirmed

in *Estelle v. Smith*, 451 U.S. 454, 462 (1981). However, the privilege does not offer any protection against potential "exposure" to civil liability. *See, e.g., Gardner v. Broderick*, 392 U.S. 273, 278 (1968). As a result, the applicability of the privilege depends upon whether the government proceedings to which the declarant would be exposed are, in effect, "civil" or "criminal". *United States v. Ward*, 448 U.S. 242, 248 (1980); *Middendorf v. Henry*, 425 U.S. 25, 34 (1976). *See also Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963) (enumerating relevant distinguishing factors); *Developments in the Law-Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1190, 1261-64 (1974) [hereinafter cited as "Developments"] (concluding that police power mental health commitments are civil proceedings to which the fifth amendment privilege does not extend).

In Argument I.A, Respondent will consider whether a proceeding under the Illinois Sexually Dangerous Persons Act, Ill. Rev. Stat. ch. 38, par. 105-1.01 to -12, ("the Act") is a "criminal case" within the meaning of the fifth amendment. Respondent will demonstrate that proceedings under the Act are essentially civil involuntary commitment procedures. Persons subjected to psychiatric examinations pursuant to the Act enjoy immunity from any criminal prosecution arising from statements made during such examinations. As a result, the fifth amendment privilege did not extend to proof of Petitioner Allen's status as a sexually dangerous person.

Argument I.B addresses the suggestion that the fifth amendment privilege is an element of the fourteenth amendment due process clause which must be applied to any proceedings under the Act. Argument I.C determines whether the values reflected by the fifth amendment will

be furthered by application of the privilege to proceedings under the Act. Argument I.D examines how the societal purposes of the Act would be affected by rigid application of the privilege in these circumstances.

Respondent notes that, although neither petitioner nor *amici* urge directly that the Act is a "criminal" legislative enactment, Petitioner and *amici* do insist that the Act is so closely akin to a criminal prosecution in its procedures that it must be viewed as the functional equivalent of a criminal prosecution to require application of the fifth amendment privilege.[2] The Illinois Supreme Court, in contrast, expressly considered the treatment purpose of the Act and concluded that "the legislative determination that the proceedings are civil in nature . . . is eminently reasonable". *People v. Allen*, 107 Ill.2d 91, 100-101, 481 N.E.2d 690 (1985) (citation deleted). Respondent urges that this construction by the Illinois Supreme Court is correct; the statute provides for compulsory psychiatric care of persons suffering from a "mental disorder", thereby creating a meaningful distinction from, and a civil involuntary commitment alternative to, criminal prosecution of sexually dangerous persons.

Respondent further believes it helpful to note that, whatever their differences about the operation of the Act itself, all parties and *amici* apparently agree that tradi-

---

[2] Although no challenge to the constitutionality of any Illinois statute has been presented, Allen contends that the fifth amendment privilege is required because the Act essentially visits punishment on the mentally ill, sexually dangerous person. (Pet. Br. 37-38). As a result, petitioner posits an unconstitutional result and then seeks to shroud it with procedural safeguards. *See Robinson v. California*, 370 U.S. 660 (1962) and *Smith v. Francis*, ____ U.S. ____, 106 S.Ct. 260, 88 L.Ed.2d 266 (1985) (Marshall, J., dissenting).

tional mental health commitment proceedings are civil actions to which the fifth amendment exclusionary rule does not apply. In the words of this Court in *Addington v. Texas*, 441 U.S. 418, 428 (1979), "a civil commitment proceeding can in no sense be equated to a criminal prosecution". *Accord*, *French v. Blackburn*, 428 F.Supp. 1351 (M.D.N.C. 1977), *aff'd mem.*, 443 U.S. 901 (1979). In *McNeil v. Director, Patuxent Inst.*, 407 U.S. 245, 250 (1972), this Court reviewed a similar Maryland defective delinquent statute but was not required to resolve the fifth amendment question. The civil nature of those proceedings has been recognized, however. *Sas v. Maryland*, 334 F.2d 506 (4th Cir. 1964), *on remand*, 295 F.Supp. 389 (D. Md. 1969), *aff'd sub nom. Tippett v. Maryland*, 436 F.2d 1153, 1157 (4th Cir. 1971), *cert. dismissed as improvidently granted sub nom. Murel v. Baltimore City Criminal Court*, 407 U.S. 355 (1972). In a similar manner, this Court did not consider the availability of the privilege in Minnesota sexual "Psychopathic Personalities" hearings, *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940), although the Court later noted the civil commitment nature of those proceedings in *Specht v. Patterson*, 386 U.S. 605, 610, n.3 (1967). Finally, in *Robinson v. California*, 370 U.S. at 664-65, this Court apparently recognized the civil nature of a compulsory treatment program which included involuntary confinement of narcotics addicts. Against this background of relevant precedent, then, this Court must now examine the distinctive character of the Illinois legislation.

A. In Both Purpose And Effect, The Act Provides A Medico-Legal Inquiry After Which Persons Suffering From Mental Disorders Are Committed For Psychiatric Care.

A particular proceeding will be deemed criminal only if the state's interest therein is clearly punitive, *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion), and the constitutional restrictions associated with a criminal prosecution are not required if an alternative, non-punitive purpose "may rationally be assigned" to questioned legislation. *Mahler v. Eby*, 264 U.S. 32, 39 (1924); *Mendoza-Martinez*, 372 U.S. at 168-69 (determining applicability of the fifth amendment). To ascertain the purpose of a particular enactment, this Court traditionally begins with an examination of legislative intent. Where, as here, the framers of a statute expressly denominate it to be "civil", this Court will disregard that description only upon the "clearest proof" that the statute is essentially penal in purpose or effect. *Ward*, 448 U.S. at 249 (citation deleted).

State court construction of the Act reveals critical differences between sexually dangerous persons proceedings and criminal prosecutions. The Illinois Sexually Dangerous Persons Act embodies a legislative judgment to provide an enlightened medical approach to the problem of the sexual psychopath or other mentally ill person with demonstrated sexual propensities.[3] *People v. Whitney*, 33 Ill.

---

[3] Because Ill. Rev. Stat. ch. 38, par. 105-1.01 (1981) refers to "all persons suffering from a mental disorder", an S.D.P. respondent with demonstrated sexual propensities apparently need not exhibit signs of the more narrowly defined "psychosexual disorders" found within the American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 261-83 (3d ed. 1980) to receive psychiatric care. Respondent Allen, for example, was diagnosed as being schizophrenic. (R. 137).

App.3d 729, 735, 338 N.E.2d 233 (1975). Originally enacted in 1938 as the Criminal Sexual Psychopathic Persons Act, the initial legislation supplemented other civil commitment provisions to provide psychiatric care for criminal defendants "not insane" but nevertheless unfit for prosecution. The respondent was ordered to stand trial upon recovery. Ill. Rev. Stat. ch. 38, par. 820 (1938) and *People v. Sims*, 382 Ill. 472, 474, 47 N.E.2d 703 (1943). The sole object of those proceedings was to "ascertain the mental condition of the accused"; the hearing played "no part of the criminal proceedings" and had "no connection with his guilt or innocence". *People v. Redlich*, 402 Ill. 270, 276, 83 N.E.2d 736 (1949). As a result, the Illinois courts consistently recognized the civil nature of the earlier proceeding. *See, e.g., Sims*, 382 Ill. at 477.

Subsequent legislative revision deleted the word "criminal" from the title of the Act, adopted the present Sexually Dangerous Persons title, and added a provision to codify prior judicial opinion that the proceedings are "*civil in nature*". Ill. Rev. Stat. ch. 38, par. 822.01 (1955) and *People v. Fish*, 36 Ill.2d 220, 222-23, 221 N.E.2d 637 (1966) (emphasis supplied). Equally important, the mental disorder element was retained, and a new provision was added requiring the local prosecutor to quash any outstanding indictment related to the petition at the time of the respondent's recovery and discharge. Ill. Rev. Stat. ch. 38, par. 105-9 (1963); *People v. Burkhart*, 116 Ill.App. 3d 708, 711, 452 N.E.2d 375 (1983); *Whitney*, 33 Ill.App.3d at 735. The government must now elect between a criminal prosecution and a sexually dangerous persons proceeding. *People v. Patch*, 9 Ill.App.3d 134, 138, 293 N.E.2d 361 (1973). Alternatively stated, the Act now provides for treatment in lieu of prosecution. *United States ex rel.*

Stachulak v. Coughlin, 520 F.2d 931, 933 (7th Cir. 1975); *Allen*, 107 Ill.2d at 105; *Burkhart*, 116 Ill.App.3d at 716 (dissenting opinion). *Cf. People v. Sansone*, 18 Ill.App.3d 315, 326, 309 N.E.2d 733 (1974) (viewing both mental health commitment and sexually dangerous persons proceedings as alternatives to prosecution).[4]

Illinois courts construing the present Act have accordingly proclaimed the non-criminal nature of the proceeding in the strongest possible terms. *See, e.g., Allen*, 107 Ill.2d at 100-101; *People v. Shiro*, 52 Ill.2d 279, 283, 287 N.E.2d 708 (1972). *Accord Gomes*, 471 F.2d at 797 (rejecting double jeopardy claim in a Massachusetts Sexually Dangerous Persons proceeding); *Cross v. Harris*, 418 F.2d 1095, 1109 (D.C. Cir. 1969) (separate opinion of Burger,

---

[4] State legislatures have extended the same opportunity for treatment in lieu of prosecution in a variety of other contexts as well. *See, e.g.*, Ill. Rev. Stat. ch. 111½, par. 6321 (1984) which offers treatment for eligible drug addicts.

Respondent expresses no view concerning the availability of the privilege in proceedings that provide treatment in lieu of sentence following criminal conviction. *See, e.g.*, Petitioner's cited authority, *United States ex rel. Gerchman v. Maroney*, 355 F.2d 302 (3rd Cir. 1966) (construing a former state law which provided an alternative sentence for dangerous sex offenders who were not mentally ill). *See also McNeil*, 407 U.S. at 247 (indefinite commitment of defective delinquent in lieu of conventional sentence); *Baxstrom v. Herold*, 383 U.S. 107 (1966) (treatment after expiration of criminal sentence); *Humphrey v. Cady*, 405 U.S. 504 (1972); and *Specht*, 386 U.S. at 607 (treatment in lieu of sentence). *But see Hollis v. Smith*, 571 F.2d 685 (2d Cir. 1978) (refusing privilege for indeterminate sentencing provision of New York Sex Offenders Law) and *Gomes v. Gaughan*, 471 F.2d 794 (1st Cir. 1973) (no right to counsel before sixty day commitment as a Sexually Dangerous Person in lieu of sentence). Statutes which do not require proof of mental illness are equally dissimilar. *See, e.g., Millard v. Harris*, 406 F.2d 964 (D.C. Cir. 1968) (construing Sexual Psychopath Act). These distinctions are further explored in *Developments*, *supra*, at 1264, n. 340.

J.) (recognizing nonpenal nature of the District of Columbia Sexual Psychopaths Act); *Commonwealth v. Barboza*, 387 Mass. 105, 438 N.E.2d 1064, 1069-71, *cert. denied*, 459 U.S. 1020 (1982) (rejecting fifth amendment privilege, right to jury trial, and double jeopardy claim in a civil Sexually Dangerous Persons proceeding) and *People v. Chapman*, 301 Mich. 584, 4 N.W.2d 18, 26 (1942) (declining to extend the state constitutional privilege against self-incrimination to a civil Criminal Sexual Psychopathic Persons proceeding).[5]

The actual operation and effect of the Act are equally significant. Petitioner seeks to find indicia of a "criminal case" in required proof of a criminal propensity for acts of sexual assault or sexual molestation of children. Ill. Rev. Stat. ch. 38, par. 105-1.01 (1981). Alternatively stated, the Act requires that the mentally ill respondent be sexually "dangerous". These additional elements only serve to define the sexually aberrant nature of the mental disorder, however; the Act required proof that Allen's mental illness manifested itself in sexual conduct. The larger class of mentally ill persons for whom civil confinement and treatment may be ordered has been limited. *Cf. People v. Pembrock*, 62 Ill.2d 317, 322, 342 N.E.2d 28 (1976) and *Pearson*, 309 U.S. at 275 (rejecting equal protection challenges). *See also Sims*, 382 Ill. at 476 (finding a reasonable legislative basis for the classification).[6]

---

[5] A complete survey of state sexually dangerous persons statutes is found in Annot., 24 A.L.R.2d 350 (1952) and 34 A.L.R.3d 652 (1970).

[6] In this connection, it is noteworthy that the Act may be used to obtain treatment for persons suffering from mental disorders who are indeed "dangerous" but who are not "reasonably expected to inflict serious physical harm upon . . . another *in the near future*" for commitment under Ill. Rev. Stat. ch. 91½, par. 1-119(1) (1979) (emphasis supplied).

Equally significant, the State in these proceedings proves a proclivity, rather than an isolated act of transgression with its own *scienter* requirement. *Allen*, 107 Ill.2d at 105; *Mendoza-Martinez*, 372 U.S. at 168. Although a criminal charge prompts the filing of a commitment petition, the prosecutor need not necessarily prove the specific underlying criminal charge to sustain his burden of proof under the Act. Ill. Rev. Stat. ch. 38, par. 105-3 (1981). Simply stated, the proceeding does not resolve specific factual issues of guilt or innocence. *People v. Capoldi*, 10 Ill.2d 261, 266, 139 N.E.2d 776 (1957); *People v. Pygott*, 64 Ill. App.2d 284, 290-91, 211 N.E.2d 382 (1965). *Accord French*, 428 F.Supp. at 1359 (rejecting fifth amendment privilege for civil commitment proceedings for this reason); *Tippett*, 436 F.2d at 1157 (similarly rejecting privilege for defective delinquent proceedings). *Cf. McKeiver v. Pennsylvania*, 403 U.S. 528, 551-53 (1971) (White, J., concurring) (noting the same difference in substance between the criminal and juvenile courts). As this Court has already observed, "[w]hether the individual is mentally ill and dangerous . . . turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists". *Addington*, 441 U.S. at 429 (emphasis in original). *See also Vitek v. Jones*, 445 U.S. 480, 498 (Powell, J., concurring) (examining medical decision to transfer a prisoner to a mental hospital).

In this connection, Respondent rejects the suggestion that this required "dangerousness" finding will *ipso facto* transform an otherwise civil proceeding into a criminal prosecution. This argument simply proves too much. Most states now require or permit a finding of danger to others for involuntary mental health commitments. *See, e.g.*, Ill. Rev. Stat. ch. 91½, par. 1-119 (1979) and *Sansone*, 18 Ill. App.3d at 322. Indeed, a dangerousness finding may be

constitutionally required for at least a postconviction proceeding. *Humphrey*, 405 U.S. at 509. *See also O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975). Under petitioner's reasoning, however, involuntary mental health commitment proceedings must then be "criminal" in nature for the fifth amendment. *But see Addington*, 441 U.S. at 428.[7]

Finally, Respondent recognizes that proof of a *demonstrated* propensity is needed. As the Illinois Supreme Court observed, confinement should not be ordered on mere psychological speculation. 107 Ill.2d at 105. This requirement of an overt act may have been included to protect the statute against preventive detention claims. *See, e.g., Cross*, 418 F.2d at 1099-1100. If, as petitioner suggests, evidence of an overt act renders the statute sufficiently "criminal" for application of the fifth amendment, then Respondent notes the unfortunate and ironic result that a provision intended to assure a valid civil commitment statute has become the very ground for its demise as a criminal prosecution alternative.

To prove future dangerousness, the State may introduce evidence of a respondent's past crimes or convictions. Ill. Rev. Stat. ch. 38, par. 105-5 (1981); *Burkhart*, 116 Ill. App.3d at 713. However, this antecedent conduct is received to show the respondent's mental condition and to predict future behavior, rather than to punish past mis-

---

[7] The fact that a state, in a valid exercise of its police power, may supplement *parens patriae* concerns with measures to protect the welfare and safety of other citizens does not render a statute "punitive" for the fifth amendment. (Pet. Br. 27). This suggestion is carefully considered and rejected in *Developments*, *supra*, at 1306. The *parens patriae* concern for petitioner's danger to himself should not be overlooked in this particular case, however, because Terry Allen was suicidal before commitment. (J.A. 34).

deeds. *People v. Sly*, 82 Ill.App.3d 742, 747, 403 N.E.2d 72 (1980); *Allen*, 107 Ill.2d at 105. *Accord Pearson*, 309 U.S. at 274 (approving "evidence of past conduct [as] pointing to probable consequences" in a Minnesota Psychopathic Persons proceeding); *In Re Field*, 120 N.H. 206, 412 A.2d 1032, 1033-34 (N.H. Sup. Ct. 1980) (rejecting claim of privilege in a mental health commitment proceeding for this reason); and *Chapman*, 4 N.W.2d at 25 (rejecting *ex post facto* claim in this connection).

If the State establishes its case, then the sexually dangerous person is committed for an indeterminate period of time to the Menard Psychiatric Center in Chester, Illinois. Contrary to the suggestion of *amici*, the statutory requirement that the respondent be confined "until the person has recovered" reflects the civil treatment, rather than a criminal retributive, purpose of the Act. Ill. Rev. Stat. ch. 38, 105-8 (1981); *Mendoza-Martinez*, 372 U.S. at 168. In contrast to a fixed term penal sentence, confinement under the Act is for the indeterminate period of time needed for a person to respond to therapy and to achieve recovery. *Sly*, 82 Ill.App.3d at 748-49. *Cf. Overholser v. Lynch*, 288 F.2d 388, 393 (D.C. Cir. 1061) (en banc), *rev'd on other grounds*, 369 U.S. 705 (1962) (hospitalization of a person acquitted by reason of insanity must necessarily be for an indefinite term to be effective); *Humphrey*, 405 U.S. at 511 (analogizing indeterminate commitment under the Wisconsin Sex Crimes Act to a mental health commitment proceeding for equal protection scrutiny); and *Cross*, 418 F.2d at 1109 (Burger, J., dissenting) (necessity of therapy justifies disparate length of confinement after a non-penal adjudication as a sexual psychopath).

The sexually dangerous person has a right to treatment in a separate facility designed to provide psychiatric care.

Ill. Rev. Stat. ch. 38, par. 105-8 (1981); *Shiro*, 52 Ill.2d at 283; *Whitney*, 33 Ill.App.3d at 735. The Menard Psychiatric Center is a "specialized mental health setting", defined as a facility which specializes in mental health care. 8 Ill. Reg. 14404 (1984). Although operated under the administrative aegis of the Illinois Department of Corrections, the Menard Psychiatric Center is a facility entirely separate from any correctional center or prison. 7 Ill. Reg. 13496 (1983); *People v. Lindsey*, 45 Ill.2d 115, 117, 256 N.E.2d 808 (1970). Sexually dangerous persons committed to Menard may not be transferred or placed within the criminal population. *Shiro*, 52 Ill.2d at 283. The various types of individualized therapy and counselling provided the sexually dangerous person are described within the appendix to the Brief for Mandel Legal Aid Clinic as *amicus curiae* at A-2. The progress of persons confined at Menard is reviewed at least every six months by a staff psychiatrist, with copies of his report sent to court and counsel, although a request for a review hearing may be made at any time. 8 Ill. Reg. 14501 (1984) and Brief for *amicus* Mandel Legal Aid Clinic at A-3. The committee may also petition the circuit court for absolute or conditional release at any time under Ill. Rev. Stat. ch. 38, par. 105-9 (1973) or seek a writ of habeas corpus.

The sexually dangerous person need not be cured to be released; the respondent must be absolutely discharged as soon as he is no longer dangerous. A conditional discharge is also available when recovery cannot be determined under conditions of institutional care. Ill. Rev. Stat. ch. 38, par. 105-10 (1981); *People v. Studdard*, 51 Ill.2d 180, 194, 281 N.E.2d 678 (1972); *Burkhart*, 116 Ill.App.3d at 714; *Sly*, 82 Ill.App.3d at 746.

Finally, and perhaps most significantly, a respondent's disclosures cannot be used to establish guilt in any subsequent criminal prosecution.[8] The Act prohibits prosecution for the incident which prompted the filing of the petition. Ill. Rev. Stat. ch. 38, par. 105-9 (1981). Moreover, the Illinois Supreme Court has recognized a judicially created use restriction whereby statements cannot be used to prosecute the mentally ill respondent for other crimes which he may divulge. *Allen*, 107 Ill.2d at 104. *See generally California v. Byers*, 402 U.S. 424 (1971) and *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1963). *Compare* Ill. Rev. Stat. ch. 38, pars. 106-1 and 106-2 (1976) (providing transactional immunity) *with Kastigar v. United States*, 406 U.S. 441, 453 (1972) (finding a lesser use and derivative use immunity is co-extensive with the constitutional privilege). As a result, the state may require testimony even over respondent's constitutional objection. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). *See also Estelle v. Smith*, 451 U.S. at 468-69. Sufficient protection may already have been provided by the fifth amendment exclusionary rule itself. *Adams v. Maryland*, 347 U.S. 179, 181 (1954). With the protection of that rule, supplemented by the use restriction mandated by the Illinois Supreme Court and the immunity provisions provided by statute, a respondent's fifth amendment privilege is entirely safeguarded. *Williams v. Director, Patuxent Inst.*, 276 Md. 272, 347 A.2d 179, 191 (Ct. App.), *cert. denied*, 425 U.S. 976 (1975).

---

[8] Respondent parenthetically observes that twenty-three year old Allen's description of juvenile sexual activity was not "clearly inculpatory" or evidence constituting "potential links in a chain of evidence" for future prosecution. *See generally California v. Byers*, 402 U.S. 424, 428 (1971).

In summary, Respondent agrees with the conclusion of the Fourth Circuit Court of Appeals in a related area that "the denomination of the proceedings as civil rather than criminal is not a semantic exercise but a factual description of what occurs". *Tippett*, 436 F.2d at 1157. The Illinois Sexually Dangerous Persons Act contemplates a medico-legal inquiry into the existence of a possible mental disorder. Confinement for psychiatric treatment of that mental illness and indictment dismissal follow an adjudication. The Illinois respondent is entitled to treatment, periodic review of his condition, and release when he is no longer dangerous. *See Addington*, 441 U.S. at 429, n.4. Here, as in the mental health proceedings reviewed in *Addington*, state power is not exercised in a punitive sense. *Id.* at 428. The terms of the Act, measured against its legislative history and relevant constitutional precedent, define a civil involuntary commitment proceeding.

B. The Fourteenth Amendment Due Process Clause Does Not Require A Privilege Against Self-Incrimination To Assure Fundamental Procedural Fairness In Sexually Dangerous Persons Proceedings.

Even if the Illinois proceeding is not a "criminal case" for the purpose of the fifth amendment, the question remains whether Allen was entitled, as a matter of fundamental procedural fairness, to protection under the broader contours of the fourteenth amendment due process clause. Arguing from *In Re Gault* and *Estelle v. Smith*, petitioner and *amici* conclude that both the "exposure" of a liberty deprivation and conditions of confinement compel recognition of the fifth amendment privilege. Yet those two decisions, while providing a proper conceptual starting point, merely restate the unquestioned proposition that the privilege offers a shield against criminal liability.

Neither decision requires the conclusion that the privilege extends to mental health proceedings.

As the *Addington* decision alone reveals, this Court has not equated juvenile delinquency proceedings with involuntary commitment hearings. The focus of this Court's concern in *Gault*, as supplemented by *In Re Winship*, 397 U.S. 358 (1970), was violation of state penal law, factual guilt, and possible transfer to the adult court of general jurisdiction which results in incarceration with adult felons. *Gault*, 387 U.S. at 50-51; *Addington*, 441 U.S. at 427-28. Indeed, the *Winship* Court refrained from expressing any view concerning proof of juvenile status offenses. 397 U.S. at 359, n.1. Procedural orderliness to discourage arbitrary factfinding was also an important concern in the juvenile proceedings reviewed therein. *Gault*, 387 U.S. at 18. For all these reasons, Respondent agrees that criminal trial safeguards were properly ordered in *Gault* and *Winship*.

The *Smith* decision is similarly inapposite to the present case. Ernest Smith's statements were used to establish a predicate element of proof under Texas law to obtain the death penalty. Proof of mental status has apparently been distinguished and exempted from the fifth amendment prohibition, however. *See Smith*, 451 U.S. at 465, as construed in *United States v. Byers*, 740 F.2d 1104, 1110-11 (D.C. Cir. 1984) (en banc) (*Smith* deemed inapplicable to sanity inquiries). Another possible distinction is suggested by the dissenting opinion in *Barefoot v. Estelle*, 463 U.S. 880, 913-14 (1983) (greater procedural safeguards are required in capital cases).

Although neither the *Gault* nor *Smith* decision controls the present inquiry, Respondent recognizes that a finding of sexual dangerousness will work a liberty deprivation,

and that the due process clause is accordingly implicated here. *Pearson*, 309 U.S. at 276-77; *Addington*, 441 U.S. at 425. However, the genuine issue is one of the *measure* of process that is constitutionally due the mentally ill respondent; the fourteenth amendment requires only the essentials of due process and fair treatment. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In the words of this Court in *Patterson v. New York*, 432 U.S. 197, 208 (1977), "[d]ue process does not require that every conceivable step be taken, at whatever cost". Nor will the "fundamental" importance of the privilege alone require its application in every context. *Compare Malloy v. Hogan*, 378 U.S. 1 (1964) *with Minnesota v. Murphy*, 465 U.S. 420, ____, n.7, 104 S.Ct. 1136, 1147, n.7, 79 L.Ed.2d 409, 424-25, n.7 (1984) (the privilege is not indispensable to a fair probation revocation hearing); *and Duncan v. Louisiana*, 391 U.S. 145 (1968) *with McKeiver*, 403 U.S. at 540-41 (1971) (no right to jury determination of juvenile delinquency). *See also Parham v. J.R.*, 442 U.S. 584, 609 (1979) (the full judicial model is inappropriate in medical inquiries).

As the Illinois Supreme Court observed, a due process inquiry requires an accommodation of competing interests; this Court must weigh the individual's interest in his continued liberty and his good name against the state's legitimate interest in identifying and treating, by involuntary commitment if necessary, those citizens suffering from serious mental illness who are dangerous to themselves and others. *Morrissey*, 408 U.S. at 481. The key to resolving the tension of competing interests here is "the probable value, if any, of [an] additional . . . procedural safeguard". *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Respondent asserts that extension of the privilege to these proceedings would not protect the societal values which the privilege historically was designed to serve.

Equally serious, a right of silence, the one protection most likely to defeat the diagnostic and treatment purposes of the Act, would hinder effectuation of legitimate state goals in a manner never countenanced by this Court. *Compare Winship*, 397 U.S. at 366-67 *with McKeiver*, 403 U.S. at 547.

Respondent begins by addressing the background argument of Petitioner, in which the American Psychiatric Association joins as *amicus curiae*, that the state's treatment purpose is only an illusion of benevolence. Their argument, spun from *Gault*, may be summarized in the following manner: because past rehabilitative efforts have been disappointing,[9] the sexually dangerous persons proceeding is essentially punitive. For this reason, attributes of the adversarial process should be applied, even if the state's diagnostic and treatment goals will thereby be impaired. Respondent respectfully submits that this argument comes dangerously close to suggesting that involuntary commitment alternatives should be abandoned to return the sexually dangerous person to the criminal process. *But see Robinson v. California*, 370 U.S. 660 (1962) and *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

In this connection, Respondent disagrees with two fundamental premises of *amicus curiae*. First, the Associa-

[9] This factual predicate to their argument is simply not supported by the available evidence. The Supervising Psychologist of the Menard Psychiatric Center, Dr. Michael J. Dolan, issued a statistical report in April, 1983 which noted that of the thirty-six persons who were released from the Menard facility following treatment as Sexually Dangerous Persons, only six (or about 17%) became recidivist sexual offenders. Respondent requests that this Court take judicial notice of this data, which is excerpted in the Appendix to this Brief; ten copies of the complete statistical study prepared by Dr. Dolan have been lodged with the Clerk of this Court.

tion suggests that psychotherapy rarely benefits the non-psychotic sexual offender. Whether this be true or not, this argument simply does not apply to the Illinois legislation. Only persons suffering from demonstrated mental disorders may be declared sexually dangerous persons. Ill. Rev. Stat. ch. 38, par. 105-1.01 (1981). Petitioner Allen, for example, was diagnosed as schizophrenic. The Association agrees that treatment is successful when signs of pathology are present, however. (Br. 17).

Secondly, the Association admits there are conflicting views concerning the efficacy of treatment. (Br. 17-18). For an extensive review of the medical literature recognizing successful treatment methodologies, see *Millard v. Harris*, 406 F.2d at 982-84. This Court has confronted the difficulties presented by divergent psychiatric opinion before. *Barefoot*, 463 U.S. at 899-903.[10] In this connection, it should also be remembered that the sexually dangerous person in Illinois need not be cured to be released. Ill. Rev. Stat. ch. 38, par. 105-10 (1981). Unless this Court is presently able to conclude from mixed professional opinion that no beneficial treatment can ever be given to any mentally ill, sexually dangerous person in any context, then this Court may properly defer to state legislative judgment here. The judiciary should not be called to umpire medical disputes; this argument is properly addressed to the state legislature which enjoys broad investigatory powers to conduct additional inquiry. *See Cross*, 418 F.2d at 1109 (Burger, J., concurring and dis-

[10] The present case presents a particular irony. Despite alleged uncertainty concerning the efficacy of treatment, petitioner could claim a substantive due process right to the uncertain results of that treatment. *See, e.g., Donaldson v. O'Connor*, 403 F.2d 507 (1974), *vacated on other grounds*, 422 U.S. 563 (1975).

senting in part). The effective end of the treatment goal should not be ordered, particularly at a time when the rehabilitative goals of the correctional process have also been sharply criticized. *Sas*, 334 F.2d at 514. In the words of Mr. Chief Justice Burger in *Winship*, we must not "burn down the stable to get rid of the mice". 397 U.S. at 376. Similar views were expressed in the majority opinion in *McKeiver*, 403 U.S. at 547, and in the remarks of Justices White and Brennan in their separate opinions therein. *Id.* at 553, 555.

Next, it is helpful to place Petitioner's legitimate interests in proper perspective. Petitioner and *amici* urge that the stigma attached to an adjudication requires the extension of the privilege. Reputation alone is not a constitutionally protected interest, however. *Paul v. Davis*, 424 U.S. 693, 701 (1976). Moreover, this Court has recently rejected this very argument as a proposed justification for requiring a pre-commitment judicial hearing. *Parham*, 442 U.S. at 600-601 (holding that a greater social ostracism may well arise from the untreated mental illness).

A more important concern is presented by Petitioner's interest in his personal freedom. Arguing from *Gault*, Petitioner has emphasized the liberty interest to contend that he was entitled to a "full panoply" of criminal trial safeguards. (Pet. Br. 25). If Petitioner is correct, however, then this Court must necessarily have erred by underestimating the liberty interest to withhold the right to a jury determination in *McKeiver* (juvenile delinquency proceedings), an automatic right to counsel in *Morrissey* and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (parole and probation revocation hearings), the right to counsel in *Middendorf* (summary court-martial), the reasonable doubt standard in *Addington* (involuntary commitment proceedings), a prior judicial hearing in *Parham* (voluntary juvenile

civil commitment), and the fifth amendment privilege in *Minnesota v. Murphy* (probation revocation hearings). *See also French*, 428 F.Supp. at 1358-59 (liberty interest is insufficient to require the privilege in involuntary commitment proceedings). Very simply, the liberty interest has never been deemed determinative of the constitutional question. In the words of this Court in an analogous context, "[t]he fact that a proceeding will result in loss of liberty does not *ipso facto* mean that the proceeding is a 'criminal prosecution' ". *Middendorf*, 425 U.S. at 37, as cited with approval in *Allen*, 107 Ill.2d at 99.

Finally, it should be noted that accuracy of the factfinding mechanism has already been protected by the state. By virtue of state statute or judicial decision,[11] Allen at his sexually dangerous persons hearing was entitled to a variety of procedural protections. Allen received: notice of the petition and disclosure of the evidence against him; an opportunity to appear and present witnesses and documentary evidence before an independent decisionmaker; the right to confront and cross-examine adverse witnesses; a written transcript; and right to an appeal. Ill. Rev. Stat. ch. 38, pars. 105-4, 105-5 (1981); *People v. Nastasio*, 19

[11] A state may, of course, elect to extend procedural protections that are not compelled by the federal Constitution. *Fare v. Michael C.*, 442 U.S. 707, 731, n. 4 (1979); *Addington*, 441 U.S. at 431. Petitioner emphasizes the procedural rights already afforded the S.D.P. respondent, (Br. 19-20), but many of these are available only by legislative grant rather than as a matter of state or federal due process of law. *See, e.g., Studdard*, 51 Ill.2d at 196 (no due process right to jury determination of status). In a similar manner, state law provision for an adversarial hearing generally does not require application of additional procedural rights to plug every conceivable constitutional interstice. *See, e.g., McKeiver*, 403 U.S. at 542. *See also People v. Levy*, 311 P.2d 897, 900 (Cal. Ct. App. 1957) (additional procedural safeguards will not transform an essentially civil proceeding into a criminal action).

Ill.2d 524, 168 N.E.2d 728 (1960); *Capoldi*, 10 Ill.2d at 265. Allen had, but chose not to exercise, right to a preliminary determination of the voluntariness of his statements and a jury determination of his status. Ill. Rev. Stat. ch. 38, par. 105-5 (1981); *Capoldi*, 10 Ill.2d at 267; *Studdard*, 51 Ill.2d at 197. Most importantly, Allen was represented by counsel during a hearing in which the government proved his status by proof beyond reasonable doubt. Ill. Rev. Stat. ch. 38, par. 105-5 (1981); *Pembrock*, 62 Ill.2d at 321. *But see Addington*, 441 U.S. at 431. As a result, Petitioner received greater procedural protections than those required by *Morrissey*, 408 U.S. at 488-89. In the context of this existing constellation of rights designed to assure fundamental fairness,[12] then, the genuine issue is

---

[12] Relying in part on this Court's decision in *Mathews v. Eldridge*, the Illinois Supreme Court decided that the due process clause does not require extension of the privilege to these proceedings. 107 Ill.2d at 102. The parties' present confusion concerning the applicability of *Mathews* stems in large measure from a fundamental disagreement concerning societal values to be promoted by the fifth amendment.

Pointing to this Court's comment in *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966), the Mental Health Information Service, Second Judicial Department, as *amicus curiae* argues that the privilege is not designed to assure accuracy of S.D.P. factfinding procedures. (Br. 9). *Accord Barter*, 425 U.S. at 319. As a result, *amicus* criticizes any application of *Mathews* to the case at bar. Petitioner, in contrast, citing *Gault*, 387 U.S. at 44-45, examines statement admissibility rather than factfinding procedures and argues "reliability is a concern of the privilege". (Br. 41). *Accord Miranda v. Arizona*, 384 U.S. 436 (1966). *Contra Gault*, 387 U.S. at 80, n. 3 (Stewart, J., dissenting) (confessions should be judged by the due process clause). Petitioner accordingly believes that the *Mathews* case provides a correct model for decision, but that the state court miscalculated the weight of competing interests. The American Psychiatric Association as *amicus curiae* apparently agrees with both. (Br. 21). Other courts have relied

(Footnote continued on following page)

whether the fifth amendment privilege could serve a distinctive and necessary purpose. *McKeiver*, 403 U.S. at 543; *Mathews*, 424 U.S. at 335; and *Addington*, 441 U.S. at 423.[13] Respondent now addresses that topic.

C. The Historical Fifth Amendment Values Of Freedom From Coercion And A Fair Balance Between The State And Its Individual Citizens Are Not Served By Extension Of The Privilege To A Mental Health Commitment Context.

A concern for inhumane treatment or coercive practices which encourage false confessions underlies the constitutional privilege. Although oppressive techniques alone offend the Anglo-American tradition of justice, *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961), statements may be rendered inadmissible under fifth amendment theory in the belief that coercion encourages false acknowledge-

---

[12] *continued*
on *Mathews* to reject the privilege for involuntary commitment proceedings, however. *See, e.g., In Re Matthews*, 613 P.2d at 91.

It may well be true that different concerns obtain when, as here, the admission of statements, rather than the accuracy of factfinding procedures, is at issue. *McKeiver*, 403 U.S. at 543. To the extent that *Mathews* emphasizes the importance of determining the "probable value, if any, of [an] additional . . . procedural safeguard" to serve *any* of the values protected by the fifth amendment, Respondent has relied upon the *Mathews* decision in argument. Concerning the generally uncertain policies underlying the privilege, see McKay, *Self-Incrimination and the New Privacy*, 1967 Sup. Ct. Rev. 193.

[13] Judge Friendly has aptly characterized the present issue in his excellent article *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1300-1301 (1975): "[t]he trend in one area after another has been to say, 'If there, why not here?' And '[t]he tendency of a principle to expand itself to the limit of its logic' has not been much counteracted, as Cardozo expected, 'by the tendency to confine itself within the limits of its history' " (citation deleted). *Accord Gault*, 387 U.S. at 74 (Harlan, J., concurring).

ment of guilt. *Murphy*, 378 U.S. at 55; *Malloy*, 378 U.S. at 8; *Gault*, 387 U.S. at 45. In this connection, Petitioner broadly argues that recognition of the privilege here is imperative to assure truthfulness of disclosures made to examining psychiatrists. Allen peremptorily dismisses all other procedural safeguards as "simply inadequate". (Pet. Br. 31). To the extent that the privilege is genuinely needed for this purpose,[14] petitioner's argument within this particular case cannot withstand close scrutiny.

Although "compulsion" is essential to a fifth amendment violation, any suggestion of coercion is noticeably absent in this case. Petitioner has never claimed that his forensic examinations were conducted in a coercive atmosphere. Indeed, this Court's decision in *Estelle v. Smith* could be construed as rejecting any *per se* rule of the sort. 451 U.S. at 465. In a similar manner, petitioner did not allege that coercive techniques were actually practiced on him, and Allen did not pursue the pre-hearing voluntariness determination that was available to him under state law.[15] In fact, one of the psychiatrists concluded that Allen chose to talk to him in the hope of obtaining more favorable treatment as a sexually dangerous person rather than as a felon. (J.A. 36-37). Equally important, representation by counsel at the time of the examinations reduced the prospect of coercion. *Michael C.*, 442 U.S. at 719; *Smith*, 451 U.S. at 475 (Rehnquist, J., dissenting).

---

[14] Concerning the protection already offered by the fourteenth amendment due process clause, *see Michigan v. Tucker*, 417 U.S. 443 (1974) and the cases cited in note 12, *supra*. *See also Mathews*, 424 U.S. at 335 concerning the importance of alternative safeguards for the fifth amendment privilege.

[15] The Illinois Supreme Court nevertheless independently determined that Allen's statements were voluntarily given. *Allen*, 107 Ill.2d at 101.

It is also noteworthy here that examining psychiatrists were not primarily concerned with truthfulness of statement content. (R. 116). For example, Drs. Colen and Beck examined Allen's logic and thought processes and probed for signs of hallucinations and delusions during the mental status examinations.[16] (R. 98). False disclosures, then, were equally probative of Allen's mental disorder.[17] *Cf. Addington*, 441 U.S. at 429 (examining psychiatrists assess the meaning of the facts). Indeed, partial disclosures or half-truths given under a claim of privilege would actually "derogate[ ] rather than improve[ ] the chances for accurate decisions" in this proceeding. *Baxter*, 425 U.S. at 319. *See also United States v. Albright*, 388 F.2d 719, 725 (4th Cir. 1968) (noting danger of half-truths in an insan-

---

[16] Allen reported hearing voices which told him to "kill himself". (J.A. 34; R. 98).

[17] The extent to which Allen's statements could be used as "real" rather than as "testimonial" evidence in this civil inquiry is presently unclear. *Compare Smith*, 451 U.S. at 463-65 *with Addington*, 441 U.S. at 429. Under the concept of a verbal act, borrowed from the law of hearsay, a respondent's disclosures are not considered for the truth of matters asserted therein but as material from which expert medical opinion is drawn. *See, e.g., Schmerber v. California*, 384 U.S. 757 (1966) (blood samples) and *United States v. Baird*, 414 F.2d 700, 709 (2d Cir. 1969), *cert. denied*, 390 U.S. 1005 (1970) (insanity inquiry). Consider as well the opinion delivered by Circuit Judge Blackmun in *Pope v. United States*, 372 F.2d 710, 721 (8th Cir. 1967) (en banc), *vacated and remanded on other grounds*, 392 U.S. 651 (1968) (holding "real" evidence of defendant's mental state is admissible to rebut a claim of insanity). Where, as here, a man's statements have an independent clinical significance, and the basic issue is not whether "the accused committed the act alleged", *Addington* at 429, there is a compelling suggestion that the psychiatrists questioned Allen "in the belief that the substance of [his] responses or the way in which he gave them might cast light on what manner of man he was". *Smith*, 451 U.S. at 475 (Rehnquist, J., dissenting), citing *Hollis v. Smith*, 571 F.2d 685, 690-91 (2d Cir. 1978) (construing New York Sex Offenders Law). *See also California v. Byers*, 402 U.S. at 432.

ity inquiry). Because truthfulness of statement content is not a primary concern when assessing mental illness, the privilege should not be extended beyond its historical limits to exclude reliable and freely given evidence of a man's mental state.

Allen next suggests that respondent-generated evidence is *per se* objectionable. The fifth amendment does reflect the belief that "a fair state-individual balance" requires the government to "shoulder the entire load". *Murphy*, 378 U.S. at 55 (citation deleted). The government has never been denied all access to a man's voluntary statements or other reliable evidence, however.[18] *Michigan v. Tucker*, 417 U.S. at 449-50; *Schmerber v. California*, 384 U.S. 757 (1966). Equally important, this argument for the privilege, which suggests the government can find necessary proof from secondary sources, loses its persuasiveness in the distinctive context of a mental illness inquest. Whereas other reliable sources of evidence are available to establish juvenile delinquency or commission of a crime, mental illness is not susceptible of objective proof. Respondent directly challenges the notion that the government could reliably prove respondent's mental disorder without the direct and "best evidence" provided by respondent's self-description.[19] This Court has already noted the desirability of expert medical opinion in other contexts,

---

[18] If the "fair balance" rationale is sufficient reason alone to exclude evidence, then no confession, however voluntarily made, could ever be admitted in evidence. The fair balance language was coined by Dean Wigmore who did not recognize the applicability of the privilege outside the courtroom. In his view, the privilege only prohibited calling the defendant as a witness. Friendly, *The Fifth Amendment Tomorrow*, 37 U. Cin. L. Rev. 671, 690 (1968).

[19] The problem is exacerbated when, as here, the government shoulders the burden of proof beyond reasonable doubt. *Culombe*, 367 U.S. at 576; *Addington*, 441 U.S. at 430.

Barefoot, 463 U.S. at 898-99, and psychiatrists do—and should—rely on a respondent's interpretation of his own behavior. Compare the necessity for "self-reporting" in *Byers*, 402 U.S. at 426 and see *Parham*, 442 U.S. at 607; *Smith*, 451 U.S. at 465; *Gomes*, 471 F.2d at 799; and *Rollerson v. United States*, 343 F.2d 269, 271 (D.C. Cir. 1964). *See also* Brief for American Psychiatric Association as *amicus curiae* in *Smith*, 451 U.S. at 464, n. 8 (expressing the belief that predictions of future dangerousness cannot be made without resort to defendant's statements).

Perhaps Judge Friendly has best summarized our present concern:

> [i]t is a curious principle that would prohibit investigators from beginning their investigation by seeking information from the person best qualified to give it and would require them to operate under the rules of blind man's buff.

Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cin. L. Rev. 671, 691 (1968). Where, as here, the State cannot prove its case by the independent labor of its officers, the questioning acquires a compelling necessity which is its own justification, and the privilege should not be recognized. *See generally Culombe v. Connecticut*, 367 U.S. 568, 571 (1961).[20] For

[20] The Mental Health Information Service, Second Judicial Department, as *amicus curiae* has expressed concern that forensic examinations also threaten the inviolability of the human personality and the right of every citizen to a "private enclave" of thoughts. (Br. 10-11). This idea was first expressed in *United States v. Grunewald*, 233 F.2d 556, 581-82 (2d Cir. 1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957). Respondent does not find this rationale to be determinative or even persuasive in the present case. If this argument were accepted, then no voluntarily given

(Footnote continued on following page)

testimony that is required by law, a fifth amendment right to silence is ill-advised. The fourteenth amendment assurance of voluntary statements provides the appropriate and adequate safeguard.

D. A Right To Silence During Psychiatric Examinations Would Thwart The Diagnostic And Treatment Purposes Of The Proceedings.

Petitioner cannot realistically deny that a right of silence during forensic examination would present a significant obstruction; the only genuine issue is whether that burden is reasonable and constitutionally required. *Culombe*, 367 U.S. at 580. Respondent submits that recognition of a fifth amendment privilege during forensic evaluation would have a seriously debilitating effect on the sexually dangerous persons inquiry.[21]

As the factual summary to this brief has demonstrated, the mental status evaluation is a complex event during which the examiner seeks to assess the meaning of a "host of subtle but important behaviors" to reach a clinical conclusion. *Byers*, 740 F.2d at 1168 (dissenting opinion).

---

[20] *continued*
confession could ever be used, or any witness subpoenaed for testimony, in any criminal or civil proceeding. The privacy theory is carefully examined and debunked by Judge Friendly, *supra* note 18, at 687-90. *See also Taylor v. Best*, 746 F.2d 220, 225 (4th Cir. 1984) (rejecting privacy rationale to hold the privilege inapplicable in prison interviews).

[21] After reviewing all the theories invoked by courts to deny the privilege in insanity inquiries, the District of Columbia Circuit Court noted "they have denied the Fifth Amendment claim primarily because of the unreasonable and debilitating effect it would have upon society's conduct of a fair inquiry into defendant's culpability". *Byers*, 740 F.2d at 1104. That court forthrightly refused to recognize the privilege for pragmatic reasons alone. *Id.*

See also Addington, 441 U.S. at 429. The personal interview itself has been variously described as "absolutely indispensable", as "a very essential ingredient", and as "the basic tool of psychiatric study" which "requires rapport" between the examiner and respondent. *Sas*, 295 F.Supp. at 411; *Commonwealth ex rel. Finken v. Roop*, 234 Pa. Super. 155, 339 A.2d 764, 782 (1975), *cert. denied*, 424 U.S. 960 (1976) (dissenting opinion); and *Rollerson*, 343 F.2d at 274.

In this endeavor, silence could never aid but could destroy the diagnostic process and thereby defeat the purpose of the proceeding. *Tippett*, 436 F.2d at 1162 (Sobeloff, J., concurring). This Court has consistently refused to impose impossible burdens upon the states. *Gault*, 387 U.S. at 71 (Harlan, J., concurring). In the particular context of involuntary commitment, the Court has refused to undercut the interests of both the state and the individual in needed psychiatric care. *Addington*, 441 U.S. at 430. *Cf. Smith*, 451 U.S. at 50, n. 59. To the extent that an examining psychiatrist needs to inquire into past criminal conduct, he should be permitted to do so as long as his opinions are received only to establish respondent's status as a person in need of psychiatric care. Model Penal Code § 4.09 (Proposed Official Draft, 1962); *State v. Whitlow*, 45 N.J. 3, 210 A.2d 763, 769 (1965); *Albright*, 388 F.2d at 726, n. 9. *Compare Smith*, 451 U.S. at 466 (where statements were used in the "distinct circumstances" of a death penalty hearing).

Without the information necessary for psychiatric diagnoses, state courts could be compelled to make medico-legal determinations without the benefit of expert medical testimony. Equally serious, elimination of this civil involuntary commitment alternative could only result in a Pyrrhic victory in which mentally ill persons are subjected

to criminal prosecution and denied the benefit of needed psychiatric care. In Respondent's considered opinion, extension of the fifth amendment privilege to sexually dangerous persons proceedings is both unwarranted and unwise.

II.

BECAUSE PSYCHIATRIC EXAMINATIONS DO NOT PRESENT THE INHERENTLY COERCIVE ATMOSPHERE CONDEMNED IN *MIRANDA v. ARIZONA*, 384 U.S. 436 (1966), ANY FIFTH AMENDMENT PRIVILEGE IS NOT SELF-EXECUTING AND MUST BE CLAIMED BY A COUNSELED EXAMINEE.

As noted earlier, the S.D.P. respondent enjoys immunity from criminal prosecution arising from disclosures made during psychiatric examination. Petitioner nonetheless urges that the fifth amendment privilege should extend to shield disclosures offered to prove his mental condition. In this connection, he insists that the privilege is meaningful only if the respondent is advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) before any psychiatric examination. However, his claim is tenable only if this Court concludes that psychiatric examinations present the same kind of inherently coercive atmosphere that a criminal defendant encounters during custodial police interrogation at the stationhouse. Respondent submits that the better-reasoned authorities indicate that no formal warnings are necessary for the counseled respondent during a forensic evaluation in which there are no compelling pressures to admit criminal liability. Respondent further believes that *Miranda* warnings would work the same stultifying effect on psychiatric diagnosis that is presented by application of the privilege generally. Because *Miranda* warnings are wholly inappropriate in this context, the general rule of privilege assertion should remain.

As Justice Rehnquist succinctly observed in *Estelle v. Smith*,

> [t]he *Miranda* requirements were certainly not designed by this Court with psychiatric examinations in mind.

451 U.S. at 475. The focus of the *Miranda* Court's concern was "incommunicado interrogation of individuals in a police-dominated atmosphere" in which a criminal suspect could be exposed to any number of physically or psychologically coèrcive techniques without the assistance and protection of counsel. *Miranda*, 384 U.S. at 445. In the oft-repeated language of the Court, that atmosphere "carries its own badge of intimidation". *Id.* at 457. Neither this Court nor Petitioner has ever suggested that psychiatrists during forensic evaluation similarly seek to subjugate the examinee's will to force admissions of criminal culpability. In fact, by suggesting in *dicta* that competency and sanity diagnoses are outside the scope of the fifth amendment, this Court has apparently rejected that very argument. *Smith*, 451 U.S. at 465-66. The state courts have reached the same conclusion. *See, e.g., In Re Ottolini*, 73 Ill.App.3d 971, 975, 392 N.E.2d 736 (1979); *Moss v. State*, 539 S.W.2d 936, 946 (Tex. Civ. App. 1976). In sum, *Miranda* warnings represent "extraordinary safeguards" that are not required outside the situation for which they were designed. *Murphy*, 465 U.S. at ____, 104 S.Ct. at 1144, 79 L.Ed.2d at 421, citing *Roberts v. United States*, 445 U.S. 552 (1980). *Accord Baxter*, 425 U.S. at 315. *See also Michael C.*, 442 U.S. at 717, n.4 wherein the Court observed that *Miranda* warnings have not been required even in the quasi-criminal delinquency proceedings for which *Gault* recognized a fifth amendment privilege.

This conclusion is not altered by the fact that Petitioner was in custody at the time of the examinations. *Baxter*, 425 U.S. at 315 (*dicta* rejecting applicability of *Miranda* theory although defendant was incarcerated in a state prison). Nor was the fact that Allen attended the examinations pursuant to court order a determinative factor. *Murphy*, 465 U.S. at ____, 104 S.Ct. at 1141, 79 L.Ed.2d at 422 (general obligation to appear and answer questions truthfully does not convert otherwise voluntary statements into "compelled" speech). In this connection, Respondent resists any suggestion that psychiatrists selected by the court, and required by statute to report to the court, were state agents who engineered an adversarial confrontation. Compare the use of a "surprise" State's witness in *Smith*, 451 U.S. at 467. Finally, there was no custodial "interrogation" here for *Rhode Island v. Innis*, 446 U.S. 291 (1980), because the examining psychiatrists did not seek to ascertain petitioner's guilt or innocence. *Smith*, 451 U.S. at 476 (Rehnquist, J., dissenting). *See also State v. O'Neill*, 545 P.2d 97, 103 (Or. Sup. Ct. 1976).

Most important for the present case, Petitioner was represented by counsel[22] at the time of the examinations.

---

[22] If, as Petitioner suggests, there is a right to *Miranda* warnings to protect the fifth amendment right to silence, then presumably there is a concomitant right to the presence of counsel during the examinations to protect that privilege. Under Petitioner's theory of the case, the logic is compelling. This suggestion has been flatly rejected by every court to consider it, however. *See Smith*, 451 U.S. at 470, n. 14. *See also Thornton v. Corcoran*, 407 F.2d 695, 705 (1969) (separate opinion of Burger, J.). Moreover, if petitioner correctly deems the S.D.P. proceeding to be a criminal prosecution, then presumably there is a separate sixth amendment right to counsel during this critical stage of the proceedings. *See generally United States v. Wade*, 388 U.S. 218 (1967). *But see United States v. Byers*, 740 F.2d at 1118 for a particularly scathing criticism of the need for counsel as a passive observer during psychiatric examination.

Allen's attorney did not attend the sessions, and Allen never requested legal consultation during questioning. *Compare Smith*, 451 U.S. at 459, n. 5 (sixth amendment violation found after examiner was appointed by *ex parte* order without notice to counsel). Counsel provides the protection which renders *Miranda* warnings unnecessary. *Miranda*, 384 U.S. at 466; *Michael C.*, 442 U.S. at 719. Equally important, Terry Allen affirmatively knew that his disclosures could be used to determine his status as a sexually dangerous person. (J.A. 36; R. 126-27, 251). *See Barboza*, 438 N.E.2d at 1070 (this knowledge is sufficient reason to deny any privilege during a sexually dangerous persons examination). *Cf. Murphy*, 465 U.S. at ____, 104 S.Ct. at 1145, 79 L.Ed.2d at 423 (a probationer is charged with the knowledge that his probation officer will report wrongdoing).

Absent compelling reasons for *Miranda* admonitions, the burdens associated with the rule should not be imposed upon the states' efforts to diagnose and treat the mentally ill. Respondent has already examined the effect of the fifth amendment privilege on forensic examinations; we merely observe at this time that state and federal courts have similarly expressed considerable alarm concerning *Miranda* warnings as well. *See, e.g., O'Neill*, 545 P.2d at 104 and *Byers*, 740 F.2d at 1115.

Respondent endorses the conclusion of Mr. Justice Rehnquist that, in the context of psychiatric examinations, the fifth amendment is not self-executing. *Smith*, 451 U.S. at 475. This conclusion enjoys solid support in a long line of decisions of this Court, most notably the cases concerning grand jury investigations and tax returns. *See, e.g., United States v. Mandujano*, 425 U.S. 564, 574-75 (1976); *Garner v. United States*, 424 U.S. 648, 653-55 (1976). The witness who fails to assert the privilege forfeits the bene-

fit of its protection. *Murphy*, 465 U.S. at ____, 104 S.Ct. at 1142, 79 L.Ed.2d at 419. On the facts of this particular case, however, there is also every reason to conclude that petitioner Allen knowingly rejected any fifth amendment protection.[23]

CONCLUSION

An Illinois Sexually Dangerous Persons proceeding is not a "criminal case" for which the fifth amendment privilege against self-incrimination is constitutionally required. Because Allen's statements to examining psychiatrists were properly received to formulate expert opinion in this mental health commitment proceeding, the judgment below should be affirmed.

Alternatively, because extension of the privilege would not promote the traditional values of the fifth amendment, and would seriously thwart the state's legitimate diagnostic and treatment goals, the privilege is not required to assure fundamental procedural fairness for the fourteenth amendment due process clause.

---

[23] As this Court observed in *Murphy*, non-assertion of the privilege is properly considered a forfeiture rather than a waiver under *Johnson v. Zerbst*, 304 U.S. 458 (1938). Because Petitioner suggests that *Miranda* admonitions are required, however, this Court has every right to question whether, with Petitioner's proposal, a mentally ill respondent who is also incompetent can ever enter a knowing and intelligent waiver. *Pate v. Robinson*, 383 U.S. 375, 384 (1976). *See generally Developments*, *supra* at 1314. Fortunately that issue is not presented in this case; this record reveals Allen's deliberate decision to seek S.D.P. adjudication.

Finally, even if there were a privilege in these proceedings for which *Miranda v. Arizona* warnings could be required, judgment should be affirmed because Allen's counseled disclosures were freely and voluntarily given in the knowledge that his statements could be used to establish his need for medical care. There was no constitutional error in this case.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois

ROMA J. STEWART
Solicitor General, State of Illinois

MARK L. ROTERT
Chief, Criminal Appeals Division

SALLY L. DILGART *
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2570

Counsel for Respondent

* Counsel of Record

APPENDIX

THE MENARD PSYCHIATRIC CENTER'S
SEXUAL TREATMENT OPPORTUNITY PROGRAM
APRIL 1983 STATISTICAL REPORT

STOP PARTICIPANTS BY TYPE OF VICTIM	Percent	Total
SDPs Offending Against Adults	10%	5
VSOs Offending Against Adults	19%	9
SDPs Offending Against Children	38%	16
VSOs Offending Against Children	33%	18
All SDPs	48%	23
All VSOs	52%	25
TOTAL	100%	48

STOP PARTICIPANTS BY AGE	Mean	Range
SDPs Offending Against Adults	31.4	20 - 61
VSOs Offending Against Adults	29.3	24 - 39
SDPs Offending Against Children	35.3	22 - 73
VSOs Offending Against Children	27.7	18 - 43
All SDPs	34.5	20 - 73
All VSOs	28.5	18 - 43
TOTAL	31.5	18 - 73

STOP PARTICIPANTS BY RACE	White	Black	Indian
SDPs Offending Against Adults	60%	40%	0%
VSOs Offending Against Adults	89%	21%	0%
SDPs Offending Against Children	78%	11%	11%
VSOs Offending Against Children	100%	0%	0%
All SDPs	74%	17%	9%
All VSOs	96%	4%	0%
TOTAL	85%	11%	4%

STOP PARTICIPANTS BY MARRIAGE	Single	Married	Divorced
SDPs Offending Against Adults	80%	0%	20%
VSOs Offending Against Adults	44%	12%	44%
SDPs Offending Against Children	72%	5%	23%
VSOs Offending Against Children	75%	19%	6%
All SDPs	74%	4%	23%
All VSOs	72%	16%	22%
TOTAL	69%	10%	21%

STOP PARTICIPANTS BY EDUCATIONAL LEVEL	Years	Range
SDPs Offending Against Adults	11.2	10 - 12
VSOs Offending Against Adults	11.4	9 - 12
SDPs Offending Against Children	10.6	7 - 14
VSOs Offending Against Children	11.0	3 - 16
All SDPs	10.4	7 - 14
All VSOs	11.1	3 - 16
TOTAL	10.8	3 - 16

STOP PARTICIPANTS IN ARMED FORCES	Percent
SDPs Offending Against Adults	20%
VSOs Offending Against Adults	34%
SDPs Offending Against Children	44%
VSOs Offending Against Children	25%
All SDPs	39%
All VSOs	28%
TOTAL	33%

STOP PARTICIPANTS WHO WERE IN FOSTER CARE	Percent
SDPs Offending Against Adults	0%
VSOs Offending Against Adults	34%
SDPs Offending Against Children	28%
VSOs Offending Against Children	13%
All SDPs	22%
All VSOs	20%
TOTAL	21%

STOP PARTICIPANTS WHO WERE IN JUVENILE CENTERS	Percent
SDPs Offending Against Adults	0%
VSOs Offending Against Adults	33%
SDPs Offending Against Children	39%
VSOs Offending Against Children	25%
All SDPs	30%
All VSOs	28%
TOTAL	29%

PARTICIPANTS IN JUV. CENTERS OR FOSTER CARE	Percent
SDPs Offending Against Adults	0%
VSOs Offending Against Adults	56%
SDPs Offending Against Children	45%
VSOs Offending Against Children	25%
All SDPs	38%
All VSOs	36%
TOTAL	35%

STOP PARTICIPANTS WITH SCHOOL BEHAVIOR PROBLEMS	Percent
SDPs Offending Against Adults	0%
VSOs Offending Against Adults	78%
SDPs Offending Against Children	50%
VSOs Offending Against Children	50%
All SDPs	39%
All VSOs	60%
TOTAL	50%

STOP PARTICIPANTS WHO ATTEMPTED SUICIDE	Percent
SDPs Offending Against Adults	0%
VSOs Offending Against Adults	78%
SDPs Offending Against Children	28%
VSOs Offending Against Children	63%
All SDPs	22%
All VSOs	68%
TOTAL	46%

STOP PARTICIPANTS WITH ALCOHOL PROBLEMS	Percent
SDPs Offending Against Adults	80%
VSOs Offending Against Adults	66%
SDPs Offending Against Children	44%
VSOs Offending Against Children	50%
All SDPs	52%
All VSOs	56%
TOTAL	54%

STOP PARTICIPANTS WHO ABUSED DRUGS	Percent
SDPs Offending Against Adults	60%
VSOs Offending Against Adults	78%
SDPs Offending Against Children	50%
VSOs Offending Against Children	66%
All SDPs	49%
All VSOs	56%
TOTAL	52%

STOP PARTICIPANTS ABUSING ALCOHOL OR DRUGS	Percent
SDPs Offending Against Adults	80%
VSOs Offending Against Adults	100%
SDPs Offending Against Children	63%
VSOs Offending Against Children	75%
All SDPs	61%
All VSOs	84%
TOTAL	73%

STOP PARTICIPANTS WHO'VE HAD ALCOHOL TREATMENT	Percent
SDPs Offending Against Adults	40%
VSOs Offending Against Adults	44%
SDPs Offending Against Children	22%
VSOs Offending Against Children	19%
All SDPs	26%
All VSOs	28%
TOTAL	27%

STOP PARTICIPANTS WHO'VE HAD DRUG ABUSE TREATMENT	Percent
SDPs Offending Against Adults	40%
VSOs Offending Against Adults	22%
SDPs Offending Against Children	6%
VSOs Offending Against Children	13%
All SDPs	13%
All VSOs	16%
TOTAL	15%

PARTICIPANTS WITH PRIOR INPATIENT/OUTPATIENT THERAPY	Percent
SDPs Offending Against Adults	60%
VSOs Offending Against Adults	100%
SDPs Offending Against Children	72%
VSOs Offending Against Children	69%
All SDPs	70%
All VSOs	80%
TOTAL	75%

PARTICIPANTS WITH PHYSICALLY ABUSED SIBLINGS	Percent
SDPs Offending Against Adults	40%
VSOs Offending Against Adults	44%
SDPs Offending Against Children	31%
VSOs Offending Against Children	13%
All SDPs	35%
All VSOs	24%
TOTAL	29%

PARTICIPANTS WITH SEXUALLY ABUSED SIBLINGS	Percent
SDPs Offending Against Adults	20%
VSOs Offending Against Adults	33%
SDPs Offending Against Children	17%
VSOs Offending Against Children	6%
All SDPs	17%
All VSOs	16%
TOTAL	17%

STOP PARTICIPANTS WHO WERE PHYSICALLY ABUSED	Percent
SDPs Offending Against Adults	60%
VSOs Offending Against Adults	89%
SDPs Offending Against Children	50%
VSOs Offending Against Children	56%
All SDPs	52%
All VSOs	68%
TOTAL	60%

STOP PARTICIPANTS WHO WERE SEXUALLY ABUSED	Percent
SDPs Offending Against Adults	60%
VSOs Offending Against Adults	44%
SDPs Offending Against Children	75%
VSOs Offending Against Children	69%
All SDPs	65%
All VSOs	60%
TOTAL	63%

STOP PARTICIPANTS PHYSICALLY OR SEXUALLY ABUSED	Percent
SDPs Offending Against Adults	80%
VSOs Offending Against Adults	89%
SDPs Offending Against Children	75%
VSOs Offending Against Children	69%
All SDPs	70%
All VSOs	76%
TOTAL	73%

STOP PARTICIPANTS SEXUALLY AND PHYSICALLY ABUSED	Percent
SDPs Offending Against Adults	40%
VSOs Offending Against Adults	56%
SDPs Offending Against Children	50%
VSOs Offending Against Children	25%
All SDPs	48%
All VSOs	36%
TOTAL	42%

PARTICIPANTS/ SIBLINGS - PHYSICALLY OR SEXUALLY ABUSED	Percent
SDPs Offending Against Adults	80%
VSOs Offending Against Adults	100%
SDPs Offending Against Children	67%
VSOs Offending Against Children	81%
All SDPs	70%
All VSOs	88%
TOTAL	81%

PARTICIPANTS SEXUALLY ABUSED BY A RELATIVE	Percent
SDPs Offending Against Adults	60%
VSOs Offending Against Adults	56%
SDPs Offending Against Children	8%
VSOs Offending Against Children	13%
All SDPs	30%
All VSOs	28%
TOTAL	31%

PARTICIPANTS SEXUALLY ABUSED BY A NON-RELATIVE	Percent
SDPs Offending Against Adults	20%
VSOs Offending Against Adults	44%
SDPs Offending Against Children	50%
VSOs Offending Against Children	63%
All SDPs	43%
All VSOs	56%
TOTAL	50%

PARTICIPANTS SEXUALLY ABUSED BY A FEMALE	Percent
SDPs Offending Against Adults	40%
VSOs Offending Against Adults	33%
SDPs Offending Against Children	28%
VSOs Offending Against Children	6%
All SDPs	30%
All VSOs	16%
TOTAL	23%

PARTICIPANTS SEXUALLY ABUSED BY A MALE	Percent
SDPs Offending Against Adults	20%
VSOs Offending Against Adults	56%
SDPs Offending Against Children	33%
VSOs Offending Against Children	69%
All SDPs	30%
All VSOs	64%
TOTAL	48%

STOP PARTICIPANTS WITH PRIOR NON-SEX CONVICTIONS	Percent
SDPs Offending Against Adults	40%
VSOs Offending Against Adults	22%
SDPs Offending Against Children	28%
VSOs Offending Against Children	44%
All SDPs	30%
All VSOs	36%
TOTAL	33%

PARTICIPANTS WITH PRIOR SEXUAL OFFENSE CONVICTIONS	Percent
SDPs Offending Against Adults	40%
VSOs Offending Against Adults	22%
SDPs Offending Against Children	56%
VSOs Offending Against Children	44%
All SDPs	52%
All VSOs	36%
TOTAL	44%

PARTICIPANTS: PAROLE VIOLATORS, NON-SEXUAL OFFENSE	Percent
SDPs Offending Against Adults	0%
VSOs Offending Against Adults	0%
SDPs Offending Against Children	0%
VSOs Offending Against Children	13%
All SDPs	0%
All VSOs	8%
TOTAL	4%

PARTICIPANTS: PAROLE VIOLATORS, SEXUAL OFFENSE	Percent
SDPs Offending Against Adults	20%
VSOs Offending Against Adults	11%
SDPs Offending Against Children	22%
VSOs Offending Against Children	13%
All SDPs	22%
All VSOs	12%
TOTAL	17%

VSOs OFFENDING AGAINST ADULTS BY OFFENSE	Percent
Murder/Deviate Sexual Assault	11%
Attempted Rape/Attempted Murder	12%
Rape/Deviate Sexual Assault	44%
Attempted Rape	33%
TOTAL	100%

VSOs OFFENDING AGAINST CHILDREN BY OFFENSE	Percent
Murder/Deviate Sexual Assault	19%
Attempted Murder	6%
Rape	6%
Burglary	6%
Indecent Liberties With a Child	63%
TOTAL	100%

SDPs OFFENDING AGAINST ADULTS	Percent	Number of Victims
Who Have Sexually Abused Juvenile Female Relatives	40%	1.0
Who Have Sexually Abused Other Juvenile Females	40%	4.0
Who Have Sexually Abused Adult Female Relatives	20%	2.0
Who Have Sexually Abused Other Adult Females	100%	13.4
Who Have Sexually Abused Juvenile Male Relatives	0	0
Who Have Sexually Abused Other Juvenile Males	0	0

Who Have Sexually Abused Adult Male Relatives	0	0
Who Have Sexually Abused Other Adult Males	0	0
AVERAGE NUMBER OF MALE VICTIMS		0
AVERAGE NUMBER OF FEMALE VICTIMS		15.6
AVERAGE NUMBER OF VICTIMS		15.6

SDPs OFFENDING AGAINST CHILDREN	Percent	Average # Of Victims
Who Have Sexually Abused Juvenile Female Relatives	56%	.8
Who Have Sexually Abused Other Juvenile Females	67%	53.8
Who Have Sexually Abused Adult Female Relatives	0%	0
Who Have Sexually Abused Other Adult Females	28%	52.4
Who Have Sexually Abused Juvenile Male Relatives	22%	.8
Who Have Sexually Abused Other Juvenile Males	67%	49.3
Who Have Sexually Abused Adult Male Relatives	6%	5
Who Have Sexually Abused Other Adult Males	11%	4
AVERAGE NUMBER OF MALE VICTIMS		44.2
AVERAGE NUMBER OF FEMALE VICTIMS		30.8
AVERAGE NUMBER OF VICTIMS		61.7

VSOs OFFENDING AGAINST ADULTS	Percent	Average # Of Victims
Who Have Sexually Abused Juvenile Female Relatives	56%	1.8
Who Have Sexually Abused Other Juvenile Females	66%	19.0
Who Have Sexually Abused Adult Female Relatives	22%	1.5
Who Have Sexually Abused Other Adult Females	100%	8.2
Who Have Sexually Abused Juvenile Male Relatives	0%	0

Who Have Sexually Abused Other Juvenile Males	0%	0
Who Have Sexually Abused Adult Male Relatives	0%	0
Who Have Sexually Abused Other Adult Males	0%	0
AVERAGE NUMBER OF MALE VICTIMS		0
AVERAGE NUMBER OF FEMALE VICTIMS		23.8
AVERAGE NUMBER OF VICTIMS		23.8

VSOs OFFENDING AGAINST JUVENILES	Percent	Average # Of Victims
Who Have Sexually Abused Juvenile Female Relatives	31%	1.3
Who Have Sexually Abused Other Juvenile Females	50%	6.6
Who Have Sexually Abused Adult Female Relatives	0%	0
Who Have Sexually Abused Other Adult Females	13%	1
Who Have Sexually Abused Juvenile Male Relatives	44%	1.8
Who Have Sexually Abused Other Juvenile Males	63%	45.7
Who Have Sexually Abused Adult Male Relatives	13%	3.5
Who Have Sexually Abused Other Adults	19%	2.0
AVERAGE NUMBER OF MALE VICTIMS		48.1
AVERAGE NUMBER OF FEMALE VICTIMS		7.0
AVERAGE NUMBER OF VICTIMS		30.6

PARTICIPANTS OFFENDING AGAINST MALES AND FEMALES	Percent
SDPs Offending Against Adults	0%
VSOs Offending Against Adults	0%
SDPs Offending Against Children	56%
VSOs Offending Against Children	19%
All SDPs	43%
All VSOs	12%
TOTAL	27%

PARTICIPANTS OFFENDING AGAINST JUVENILES & ADULTS	Percent
SDPs Offending Against Adults	40%
VSOs Offending Against Adults	78%
SDPs Offending Against Children	39%
VSOs Offending Against Children	31%
All SDPs	39%
All VSOs	48%
TOTAL	44%

SDPs OFFENDING AGAINST RELATIVES/FRIENDS & STRANGERS	Average Number F & R	Average Number Stranger
SPDs Offending Against Adults— Juvenile Female Victims	1.0	4.0
SPDs Offending Against Adults— Adult Female Victims	0.5	13.2
SPDs Offending Against Adults— Juvenile Male Victims	0	0
SPDs Offending Against Adults— Adult Male Victims	0	0
SPDs Offending Against Children/ Juvenile Female Victims	6.1	33.2
SPDs Offending Against Children/ Adult Female Victims	16.5	57.3
SPDs Offending Against Children/ Juvenile Male Victims	12.0	50.7
SPDs Offending Against Children/ Adult Male Victims	8.0	5.8

	Percent Against F & R	Percent Against Stranger
SPDs Offending Against Adults— Juvenile Female Victims	40%	40%
SPDs Offending Against Adults— Adult Female Victims	20%	100%
SPDs Offending Against Adults— Juvenile Male Victims	0%	0%
SPDs Offending Against Adults— Adult Male Victims	0%	0%

SPDs Offending Against Children/ Juvenile Female Victims	56%	44%
SPDs Offending Against Children/ Adult Female Victims	11%	22%
SPDs Offending Against Children/ Juvenile Male Victims	22%	61%
SPDs Offending Against Children/ Adult Male Victims	6%	6%

VSOs OFFENDING AGAINST FRIENDS/RELATIVES & STRANGERS	Number F & R	Number Stranger
VSOs Offending Against Adults— Juvenile Female Victims	10.3	22.0
VSOs Offending Against Adults— Adult Female Victims	4.3	8.0
VSOs Offending Against Adults— Juvenile Male Victims	0	0
VSOs Offending Against Adults— Adult Male Victims	0	0
VSOs Offending Against Children/ Juvenile Female Victims	2.3	6.8
VSOs Offending Against Children/ Adult Female Victims	1.0	0
VSOs Offending Against Children/ Juvenile Male Victims	31.4	28.2
VSOs Offending Against Children/ Adult Male Victims	1.0	3.7

VSOs OFFENDING AGAINST FRIENDS/RELATIVES & STRANGERS	Percent Against F & R	Percent Against Strangers
VSOs Offending Against Adults— Juvenile Female Victims	78%	33%
VSOs Offending Against Adults— Adult Female Victims	89%	56%
VSOs Offending Against Adults— Juvenile Male Victims	0%	0%
VSOs Offending Against Adults— Adult Male Victims	0%	0%
VSOs Offending Against Children/ Juvenile Female Victims	63%	38%

VSOs Offending Against Children/ Adult Female Victims	6%	0%
VSOs Offending Against Children/ Juvenile Male Victims	50%	38%
VSOs Offending Against Children/ Adult Male Victims	6%	19%

SDPs OFFENDING AGAINST ADULTS—PROGRAMATIC ACTIVITY

Percentage in Individual Therapy*	20%
Percentage in Group Therapy	80%
Percentage on Institutional Job Assignment	80%
Percentage in Activity/Arts/Leisure Therapy	20%
Percentage in Educational Programs	20%
Percentage in Vocational Training	0%

SDPs OFFENDING AGAINST ADULTS—PROGRAMATIC ACTIVITY

Percentage in Individual Therapy*	23%
Percentage in Group Therapy	77%
Percentage on Institutional Job Assignment	88%
Percentage in Activity/Arts/Leisure Therapy	63%
Percentage in Educational Programs	11%
Percentage in Vocational Training	11%

SDPs OFFENDING AGAINST CHILDREN—PROGRAMATIC ACTIVITY

Percentage in Individual Therapy*	33%
Percentage in Group Therapy	67%
Percentage on Institutional Job Assignment	67%
Percentage in Activity/Arts/Leisure Therapy	72%
Percentage in Educational Programs	17%
Percentage in Vocational Training	6%

SDPs OFFENDING AGAINST CHILDREN—PROGRAMATIC ACTIVITY

Percentage in Individual Therapy	0%
Percentage in Group Therapy	100%
Percentage on Institutional Job Assignment	94%
Percentage in Activity/Arts/Leisure Therapy	63%
Percentage in Educational Programs	6%
Percentage in Vocational Training	0%

SDP STATISTICS

SDPs Presently at MPC 23

SDPs Dead (Died at MPC) 1

SDPs Released 36

SDPs Known to have Recidivated 6

Total Percent of SDPs Recidivating 17%

SDPs Recidivating with a New Sentence 14%

SDPs Recidivating with a Technical Violation 03%

Supreme Court, U.S.
FILED
APR 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-5404

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TERRY B. ALLEN,

Petitioner,

v.

ILLINOIS,

Respondent.

On Writ Of Certiorari
To The Illinois Supreme Court

PETITIONER'S REPLY BRIEF ON THE MERITS

ROBERT AGOSTINELLI
Deputy Defender
VERLIN R. MEINZ
*PETER A. CARUSONA
Assistant Defenders
Office of the State Appellate Defender
628 Columbus Street-Suite 308
Ottawa, Illinois 61350
(815) 434-5531
Counsel for Petitioner

Of Counsel
JEAN HERIGODT
Assistant Public Defender
6107 N. Sauganash
First Floor
Chicago, Illinois 60646
(312) 545-2953
**Counsel of Record*

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

TABLE OF CONTENTS

Page

ARGUMENT 1

I. PRECEDENTS OF THIS HONORABLE COURT DEALING WITH SEXUAL PSYCHOPATH LEGISLATION AND WITH THE FIFTH AMENDMENT DEMAND THAT THE PRIVILEGE AGAINST SELF-INCRIMINATION BE HELD APPLICABLE TO THE ILLINOIS SEXUALLY-DANGEROUS-PERSON PROCEEDING SINCE, CONTRARY TO THE RESPONDENT'S CLAIM, THE PROCEEDING IS NOT SIMPLY AN INVOLUNTARY MENTAL-HEALTH COMMITMENT PROCESS THE PROCEDURES OF WHICH MAY BE JUDGED BY BROAD DUE-PROCESS ANALYSIS 1

A. The Illinois Sexually-Dangerous-Person Proceeding Is Totally Unlike A "True" Involuntary Mental-Health Procedure Not Only In That It Arises In A Criminal Context And Is Conducted Much Like A Criminal Prosecution But Also Because It Can Result In A Unique Adjudication Of Sexual Dangerousness And In Commitment To A Prison, At Which The Committed Person Is Considered A Prisoner And From Which He Has Only A Speculative Chance Of Release 3

B. Given The Similarities Between The Sexual-Dangerousness Proceeding And The Criminal Prosecution And The Dissimilarities Between It And The Mental-Health Commitment, This Courts' Decisions On The Topics Of Sexual-Psychopath Legislation And The Fifth Amendment—Not On Involuntary Mental-Health Commitments—Are The Most Persuasive Authority 8

C. The State's Reliance On Cases Such As *Mathews* v. *Eldridge*, 424 U.S. 319 (1976)—To Balance Interests In Having The Privilege Apply In A Sexual-Dangerousness Proceeding—Is Totally Misplaced. The Case Is Of Dubious Relevance To The Question Presented Here And, In Any Event, Does Not Support The State's Position 13

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES:

Addington v. *Texas*, 441 U.S. 418 (1979) 2, 15
Barefoot v. *Estelle*, 463 U.S. 880 (1983) 18
Blackburn v. *Alabama*, 361 U.S. 194 (1960) 16
Culombe v. *Connecticut*, 367 U.S. 568 (1961) 17
Estelle v. *Smith*, 451 U.S. 454 (1981) ..... *passim*
Gagnon v. *Scarpelli*, 411 U.S. 778 (1973) 4, 15
Humphrey v. *Cady*, 405 U.S. 504 (1972) 15
In re Collins, 102 Ill. App. 3d 138, 429 N.E.2d 531 (1981) 17
In re Gault, 387 U.S. 1 (1967) ..... *passim*
In re Winship, 397 U.S. 358 (1970) 1
Kennedy v. *Mendoza-Martinez*, 372 U.S. 144 (1963) 12
Mathews v. *Eldridge*, 424 U.S. 319 (1976) 2, 13
Matter of Rizer, 87 Ill. App. 3d 795, 409 N.E.2d 383 (1980) 19
Minnesota v. *Murphy*, 465 U.S. 420, 79 L.Ed.2d 409 (1984) 4, 15
Murphy v. *Waterfront Commission of New York*, 378 U.S. 52 (1964) 17
New Jersey v. *Portash*, 440 U.S. 450 (1974) 16
Parham v. *J.R.*, 442 U.S. 584 (1979) 15
People v. *Allen*, 107 Ill. 2d 91, 481 N.E.2d 690 (1985) .. 5, 19
People v. *Allen*, 123 Ill. App. 3d 669, 463 N.E.2d 135 (1984), *rev'd on other grounds*, 107 Ill. 2d 91, 481 N.E.2d 690 (1985) 20
People v. *Burnick*, 14 Cal. 3d 306, 121 Cal. Rptr. 488, 535 P.2d 352 (1975) 16
People v. *Cooper*, 64 Ill. App. 3d 880, 381 N.E.2d 1178 (1978) 18
People v. *Covey*, 34 Ill. 2d 195, 215 N.E.2d 220 (1966) .. 18
People v. *Parrott*, 108 Ill. App. 3d 222, 438 N.E.2d 1313 (1982) 7
People v. *Pembrock*, 62 Ill. 2d 317, 342 N.E.2d 28 (1976) 5
People v. *Redlich*, 402 Ill. 270, 83 N.E.2d 736 (1949) 19
Specht v. *Patterson*, 386 U.S. 605 (1967) ..... *passim*
Trop v. *Dulles*, 356 U.S. 86 (1958) 1
United States ex rel. Stachulak v. *Coughlin*, 520 F.2d 431 (7th Cir. 1973), *cert. denied*, 424 U.S. 947 (1976) .. 15, 16
United States v. *Ward*, 448 U.S. 242 (1980) .. 2, 4, 11, 13, 15

Table of Authorities Continued

	Page
STATUTES:	
Ill. Rev. Stat. ch. 38, § 105-9 (1983)	7
Ill. Rev. Stat. ch. 91½, § 1-100 (1983)	3
Ill. Rev. Stat. ch. 91½, § 1-119 (1983)	5
Ill. Rev. Stat. ch. 91½, § 2-100 to 2-111 (1983)	6
Ill. Rev. Stat. ch. 91½, § 3-800 (1983)	5
Ill. Rev. Stat. ch. 91½, § 3-810 (1983)	6
Ill. Rev. Stat. ch. 91½, § 3-811 (1983)	6
Ill. Rev. Stat. ch. 91½, § 3-813 (1983)	7
Ill. Rev. Stat. ch. 91½, § 3-814 (1983)	7
Ill. Rev. Stat. ch. 91½, § 3-900 (1983)	7
Ill. Rev. Stat. ch. 91½, § 3-901 (1983)	7
Ill. Rev. Stat. ch. 91½, § 3-902 (1983)	7
Ill. Rev. Stat. ch. 111½, § 6301 (1984 Supp.)	4

ARGUMENT

I.

PRECEDENTS OF THIS HONORABLE COURT DEALING WITH SEXUAL PSYCHOPATH LEGISLATION AND WITH THE FIFTH AMENDMENT DEMAND THAT THE PRIVILEGE AGAINST SELF-INCRIMINATION BE HELD APPLICABLE TO THE ILLINOIS SEXUALLY-DANGEROUS-PERSON PROCEEDING SINCE, CONTRARY TO THE RESPONDENT'S CLAIM, THE PROCEEDING IS NOT SIMPLY AN INVOLUNTARY MENTAL-HEALTH COMMITMENT PROCESS THE PROCEDURES OF WHICH MAY BE JUDGED BY BROAD DUE-PROCESS ANALYSIS.

Nearly thirty years ago, this Honorable Court cautioned "[h]ow simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them!" *Trop* v. *Dulles*, 356 U.S. 86, 94 (1958). Time has come and gone but not so this Court's thought that the question of an individual's enjoying or being denied important constitutional rights should not be decided by "civil labels and good intentions." *In re Winship*, 397 U.S. 358, 365-66 (1970). *See also In re Gault*, 387 U.S. 1, 27, 50 (1967).

Nevertheless, in arguing that the Fifth Amendment privilege against self-incrimination should not apply in an Illinois sexually-dangerous-person proceeding, the State does neither more nor less than cite the civil label attached to the proceeding and the good intention it has of providing treatment to a person adjudicated sexually dangerous. In this regard, the State labels the sexually-dangerous-person proceedings as "essentially civil involuntary commitment procedures," the goal of which is to "provide for compulsory psychiatric care of persons suffering from a 'mental disorder'" (Brief for Respondent at 8-9). From this, the State concludes that the proceeding is not a "criminal case" within the meaning of the Fifth

Amendment and that the privilege against self-incrimination, as a result, is not applicable.

By labeling the sexually-dangerous-person proceeding a civil involuntary commitment procedure, the State avoids the specific sexual-psychopath-legislation jurisprudence in cases like *Specht* v. *Patterson*, 386 U.S. 605 (1967). The State likewise is able to avoid specific Fifth-Amendment jurisprudence regarding the privilege against self-incrimination, cases including *Gault* and *Estelle* v. *Smith*, 451 U.S. 454 (1981), cases relied upon by the petitioner, and *United States* v. *Ward*, 448 U.S.242 (1980), a case cited by the State but one which hardly supports its position. Through the device of its label for the proceeding as an involuntary commitment procedure, the State lands on *Addington* v. *Texas*, 441 U.S. 418 (1979), which, for it, is firmer ground. It then is able to argue at some length, under *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), regarding the need for a privilege against self-incrimination in a proceeding labeled a civil involuntary commitment procedure.

This case, though, does not involve a civil involuntary commitment procedure. Nor is this Court obliged to determine the applicability of the privilege to such a procedure. The Illinois sexually-dangerous-person proceeding is not a civil involuntary commitment procedure simply because, as the State has argued, it is in some respects different from a criminal case. It is its own type of proceeding, perhaps somewhat different from a criminal case but certainly vastly different from a "true" civil involuntary mental-health commitment. Since it is, it should be judged by cases such as *Specht*, *Gault*, *Estelle*, and *Ward* but not by *Addington* or *Mathews*. These then will be the points of petitioner's reply.

A. The Illinois Sexually-Dangerous-Person Proceeding Is Totally Unlike A "True" Involuntary Mental-Health Procedure Not Only In That It Arises In A Criminal Context And Is Conducted Much Like A Criminal Prosecution But Also Because It Can Result In A Unique Adjudication Of Sexual Dangerousness And In Commitment To A Prison, At Which The Committed Person Is Considered A Prisoner And From Which He Has Only A Speculative Chance Of Release.

The State of Illinois opposes the application of the privilege against self-incrimination in the Illinois sexually-dangerous-person proceeding. It analogizes the proceeding to an involuntary mental health procedure and argues that such a procedure cannot be a "criminal case." It rails about the practical effect of applying the privilege to such a procedure and, in a separate point, about the effect of requiring *Miranda* warnings to effectuate the privilege.

The State's argument, however, totally fails to come to grips with the realities of the sexually-dangerous-person proceeding. Only by totally ignoring the processes and results of the proceeding can the State come to label it as an involuntary mental-health commitment procedure. It is important, as a result, to examine just how a sexually-dangerous-person proceeding differs from the "true" involuntary mental-health commitment procedure in Illinois [set out in Ill. Rev. Stat. ch. 91½, §§ 1-100, *et seq.* (1983)]. Such an examination reveals that the dangerousness proceeding may differ slightly from a criminal prosecution but is certainly light years away from the involuntary mental-health commitment process.

A point which the State does not, indeed cannot, contest is that the sexually-dangerous proceeding is tied to a criminal case from its very inception. A petition seeking a sexually-dangerous adjudication, unlike a petition for mental-health commitment, can be filed only where a

person has been charged with a criminal offense. The party seeking the adjudication can only be the prosecutor in the criminal prosecution, not the trial judge, a mental-health professional, a relative or friend of the accused or the accused himself. It is clear from all this that the origin of the sexually-dangerousness proceeding is in a criminal case and its primary actor the criminal-case prosecutor.[1]

The State also does not contest the close similarity between the conduct of a sexually-dangerousness proceeding and the conduct of a formal criminal prosecution.[2]

---

[1] The State, in advancing its claim that the sexually-dangerous-person proceeding is a mere treatment plan as an alternative to prosecution, also compares the proceeding to that under the Alcoholism and Substance Abuse Act [Ill. Rev. Stat. ch. 111½, §§6301, *et seq.* (1984 Supp.)] (Brief for Respondent at 13 n.4). The Abuse Act, though, contemplates an application for treatment made by the affected person himself, either within or without a formal criminal prosecution. It also contemplates treatment commitments sought by persons other than the affected person and, in fact, obligates a criminal-case judge to take action if an affected person comes before him.

[2] This point is important to the question of the applicability of the privilege against self-incrimination. The Sixth Amendment, like the Fifth, refers to a criminal proceeding. While the Fifth Amendment privilege against self-incrimination is generally considered broader in scope than the Sixth Amendment's guarantee of rights in a criminal proceeding [*United States* v. *Ward*, 448, U.S. 242, 253 (1980)], Sixth-Amendment jurisprudence is helpful in determining the applicability of the privilege under the Fifth [*e.g.*, *Minnesota* v. *Murphy*, 465 U.S. 420, ____, 79 L.Ed.2d 409, 425 n.7 (1984)]. There can be no question that the sexually-dangerous-person proceeding is far more like a criminal prosecution than any proceeding found non-criminal under the Sixth Amendment. *Cf. Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973) (parole- or probation-revocation proceeding not akin to a criminal trial since the State is represented by a probation or parole officer, not a prosecutor, since formal procedures and rules of evidence do not apply and since the hearing body is familiar with practice of parole or probation).

In this respect, too, the sexually-dangerousness proceeding differs dramatically from the involuntary mental-health commitment procedure under Illinois law, one which is characterized by informality and a different burden of proof. *See generally* ch. 91½, §§ 3-800, *et seq.*

Sharp differences also obtain between the dangerousness proceeding and the involuntary commitment procedure as to the findings made during the hearing. The involuntary mental-health commitment looks to a determination of the committee's mental illness and a causally-related and near-future dangerousness to himself or others or an inability to provide for himself. ch. 91½, § 1-119. The sexually-dangerousness proceeding, on the other hand, looks to a determination of a mental disorder as well as other facts. The State must prove additionally that that disorder is "coupled with," though not necessarily the cause of, criminal propensities to the commission of sex offenses. It must also demonstrate that the person whose commitment is sought has demonstrated those propensities toward acts of sexual assault, i.e., that he has committed a sex crime. *See, e.g., People* v. *Allen*, 107 Ill. 2d 91, 481 N.E.2d 690, 696-97 (1985). *See also People* v. *Pembrock*, 62 Ill. 2d 317, 342 N.E.2d 28, 30 (1976) (emphasizing "past conduct" proof in sexual-dangerousness proceeding). Obviously, the sexually-dangerous-person proceeding contemplates far different findings than the involuntary mental-health commitment procedure.[3]

---

[3] The State's failure to recognize the distinct findings required in a sexual-dangerousness proceeding impacts adversely on a number of claims it presents. For purposes of this section, it permits the State to suggest that the sexual-dangerousness proceeding is only a "medico-legal inquiry" into the person's mental condition. That is clearly incorrect, as is the State's suggestion that it only attempts to prove a "proclivity" in the course of the proceeding.

The two procedures examined here also differ greatly in the type of commitment ordered if the necessary findings of "subject to involuntary commitment" or "sexually dangerous" are made. The State is content to say that both procedures contemplate "treatment" of the person. But that ignores a great deal more than it considers. The sexually dangerous person is automatically committed to the Menard Psychiatric Center, a penal institution of the Illinois Department of Corrections. He is sent to a maximum-security institution and an ordinary prison cell. He is treated like any other prisoner, being accorded "the same services, privileges, and rights as any other inmate who is incarcerated at [the Menard Psychiatric Center]."[4] The civil mental-health committee, on the other hand, is committed (if at all) to a mental-health facility under the Department of Mental Health and Developmental Disabilities. He is so committed only after the committing court has fulfilled its statutory obligation of considering all appropriate treatment settings (including placement with a relative) and concluding that formal commitment is the "least restrictive alternative for treatment which is appropriate." Ill. Rev. Stat. Ch. 91½, §§ 3-810, 3-811 (1983). Even if committed to a mental-health facility, the committee enjoys a "bill of rights" specified by statute, including full mail, telephone and visitation privileges, a right to possess money and other personal property, a right to avoid seclusion as a form of discipline, and the like. Ch. 91½, §§ 2-100 to 2-111. In light of all this, the commitment situation of the sexually dangerous person simply cannot be equated with that of the mental-health committee.

---

[4] The quotation is from the statistical report prepared by Michael Dolan, referred to in the Respondent's brief and added in full by letter to the Clerk on February 25, 1986 (hereinafter "Dolan Report").

These two committees also differ in terms of their prospects for release or discharge. A mental-health commitment in Illinois lasts for 60 days, a period which can be extended for an additional 60 days and, thereafter, for periods of 180 days. As to each commitment period, the State bears the burden of showing both that involuntary commitment is necessary and that institutionalization is the least restrictive alternative which is appropriate. Ch. 91½, § 3-813. (In the interim, the facility director would have provided updated treatment plans and reports for the committing court's review. Ch. 91½, § 3-814.) During any period of institutionalization, the committed person may petition for discharge. Ch. 91½, § 3-900. At the subsequent hearing, the State again bears the burden of proving the need for involuntary commitment. Ch. 91½, § 3-901. The director of the facility to which the person is committed also is obligated, by statute, to discharge the person at any time when he is no longer subject to involuntary admission. Ch. 91½, § 3-902. All of this, too, is in stark contrast to the lot of a sexually dangerous person. He has been committed to Menard Psychiatric Center, a maximum-security penal institution, on the basis of an adjudication of sexual dangerousness. That commitment is indefinite in duration and not subject to mandatory periodic review. No one is statutorily obliged to seek his discharge or even to draw up or pass on a treatment plan aimed at accomplishing his discharge. He may, of course, file a petition seeking his discharge. He has the burden, though, of demonstrating the fact of his recovery. *People* v. *Parrott*, 108 Ill. App. 3d 222, 438 N.E.2d 1313, 1315-16 (1982). If he fails, he returns to the Department of Corrections. If he's only partially successful, i.e., if he leaves doubts regarding his full recovery, he is conditionally discharged—a conditional liberty subject to revocation. Ill. Rev. Stat. ch. 38, § 105-9 (1983).

The foregoing comparison of the sexually-dangerous-person proceeding and the "true" involuntary mental-health commitment can only demonstrate that the two are vastly dissimilar. The former is closely tied to a criminal prosecution and in fact looks like one, though the latter is not and does not. A person's commitment as sexually dangerous is far different and far more onerous than a commitment as mentally ill. The prospects for a person's release from the commitments are vastly different as well.

Thus, in reviewing the need for a privilege against self-incrimination in the sexually-dangerous-person proceeding, this Court should not be deceived by the State's attempt to label the proceeding as a simple involuntary mental-health commitment procedure. The proceeding is far different and, as a result, deserves more careful analysis than the State invites.[5]

B. Given The Similarities Between The Sexual-Dangerousness Proceeding And The Criminal Prosecution And The Dissimilarities Between It And The Mental-Health Commitment, This Courts' Decisions On The Topics Of Sexual-Psychopath Legislation And The Fifth Amendment—Not On Involuntary Mental-Health Commitments—Are The Most Persuasive Authority.

The State's denomination of the sexually-dangerous-person proceeding as an involuntary mental-health com-

---

[5] Even if the sexual-dangerousness proceeding were simply a "true" involuntary mental-health commitment procedure, there would be dispute regarding the applicability of the privilege. The New York Mental Health Information Service as *amicus curiae* argues that the privilege attaches at the adjudicatory stage of any civil commitment proceeding. While petitioner thinks that that question is broader than the instant case and thus takes no formal position, he does dispute the State's suggestion (at pages 9-10) that everyone "apparently agree[s] that traditional mental health commitment proceedings are civil actions to which the fifth amendment exclusionary rule does not apply."

mitment procedure is not only potentially deceiving as a matter of fact, as outlined above at Part A. It also tends to mislead in regard to the precedent of this Court which should be applied in deciding the issue presented here, the applicability of the privilege against self-incrimination.

In arguing that the privilege should be applicable in a sexually-dangerous-person proceeding, the petitioner clearly has relied on cases of this Court considering sexual-psychopath legislation [e.g., *Specht* v. *Patterson*, 386 U.S. 604 (1967)] and on specific Fifth-Amendment jurisprudence of this Court [e.g., *In re Gault*, 387 U.S. 1 (1967) and *Estelle* v. *Smith*, 451 U.S. 454 (1981)]. The State, however, mentions *Specht* hardly at all (Brief for Respondent at 10 and 13) and quickly disposes of both *Gault* and *Smith* by saying that neither considers "involuntary commitment hearings" or "proof of mental status" (*Id.* at 21). Once the State's deceiving "mental-health commitment" approach is put to one side, however, the pertinence of *Specht*, *Gault* and *Estelle* again is apparent.

An obvious shortcoming of the State's response is its total failure to confront *Specht* v. *Patterson*. That case concerns sexual psychopath legislation, which is exactly the type of legislation which the Illinois Sexually Dangerous Persons Act is. As argued in petitioner's original brief, *Specht* calls for a "full panoply" of procedural protection, and "all those safeguards which are fundamental rights and essential to a fair trial" in a sexual-psychopath proceeding. Those protections and safeguards must include a privilege against self-incrimination, as the petitioner went on to argue (Brief for Petitioner at 20-21). To that argument the State has responded only obscurely. The State reads the argument (though attributing it to *Gault*) as a criticism of a host of this Court's decisions (Brief for Respondent at 25-26), yet fails to consider that

not a single decision allegedly criticized concerns the unique sexual-psychopath legislation as *Specht* does. It also makes a passing attempt to distinguish *Specht* (*Id.* at 13 n.4) on the grounds that *Specht* concerned a sexual-psychopath-commitment scheme triggered *after* formal conviction (with full criminal-trial safeguards). The State fails to realize, though, that any such distinction must necessarily redound in petitioner's favor.[6]

The State's brief as Respondent is no more diligent in its attention to *In re Gault* and *Estelle* v. *Smith*. According to the State, neither case comes into play in determining whether the sexually dangerous person proceeding is a "criminal case" for purposes of the Fifth Amendment and its privilege against self-incrimination. (See Brief for Respondent at 20.) That is surprising—and indefensible—since both cases are Fifth-Amendment cases (at least in the parts relied upon by the petitioner). *Gault* carefully examines the juvenile-delinquency proceeding, focuses on the nature and extent of the possible confinement involved and the nature of the stigma resulting from the proceeding, and concludes that the delinquency proceeding "must be regarded as 'criminal' for purposes of

---

[6] The commitment scheme in *Specht* did arise after formal conviction, e.g., after the defendant had been convicted (with full procedural safeguards) and found deserving of some sort of sanction, either criminal sentencing or commitment as a sex offender. The sexual-dangerousness proceeding in Illinois combines the adjudicatory and dispositional phases into one hearing.

The concerns of *Specht* were twofold: that the sexual-psychopath proceeding was open to abuse and that it involved a new and separate factual finding made without adequate safeguards. Neither concern is eliminated—indeed the former may be worsened—by a proceeding which calls for the unique finding of sexual dangerousness and an automatic commitment based on that finding.

the privilege against self-incrimination." *In re Gault*, 387 U.S. 1, 49 (1967). It did so despite recognizing the facts that juvenile proceedings were not equivalent to formal criminal prosecutions and had a substantial rehabilitative, rather than punitive, purpose. It must be considered pertinent here as well, even if the sexually-dangerous-person proceeding is not a formal criminal prosecution and even if it can be assigned something of a treatment purpose. So, too, should *Estelle* v. *Smith*. The sentencing proceeding in *Estelle*, like the proceeding at issue, did not "resolve specific factual issues of guilt or innocence" (Brief for Respondent at 15). It instead involved an inquiry into the question of the defendant's "future dangerousness," certainly a "medico-legal inquiry" (*Id.* at 11). This Court nevertheless held the privilege against self-incrimination fully applicable. The significance of its having done so should not be ignored in the case at bar, as the State has done.

Interestingly, the State does mention, but fails to develop, the one Fifth-Amendment decision of this Court which is most tolerant of reference to "civil" and "criminal" labels. On inspection, its failure to develop the case is not surprising: the case simply does not support its point. In *United States* v. *Ward*, 448 U.S. 242 (1980), this Court considered whether a proceeding for assessment of a "civil penalty" under the Federal Water Pollution Control Act was a "criminal case" for purposes of the Fifth Amendment privilege against self-incrimination. The Court noted a traditional two-part test for determining whether a penalty is civil or criminal: 1) whether the legislature has expressed a preference for one label over another and 2) whether, in the event of a civil label, the statutory scheme was nevertheless so punitive in purpose or effect as to overcome the label. *Id.* at 248-49. According

to the Court, the standards set forth in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), were "helpful," but not "exhaustive" or "dispositive," as to the second prong of the test. *Id.* at 249. The Court went beyond that two-part test in order to "completely dispose" of the case, noting that a proceeding, in any event, could be "'quasi-criminal' and therefore sufficient to implicate the Fifth Amendment's protection against compulsory self-incrimination." *Id.* at 251.

While application of the various tests resulted in a finding in *Ward* that the civil-penalty proceeding was not a "criminal case," it would mean a clear "criminal case" result in the case at bar. There is no question that the Illinois legislature has opted for a "civil" label in the sexual-dangerousness proceeding. There is likewise no question, however, that the statutory scheme is so punitive in effect as to overcome that label. Illinois has shown what a truly "civil" mental-health commitment is all about. As discussed above (at Part A), the sexually-dangerous-person commitment is vastly different from and far more punitive than that mental-health commitment. The civil label, as a result, cannot control.[7] Exam-

---

[7] Application of the factors from *Kennedy* v. *Mendoza-Martinez* supports that conclusion. The sanction here—an indeterminate commitment to a penal facility—obviously involves an "affirmative disability or restraint." Commitment to such an institution, especially as contrasted to a mental-health facility, must be "regarded as a punishment." To the extent that the sexual-dangerousness proceeding involves proof of the demonstration of propensities to commit sex crimes, i.e., the proof of the commission of sex offenses, the proceeding involves "a finding of scienter" and applies to behavior which "is already a crime." The "traditional aims of punishment" are being promoted by the sexual-dangerousness commitment since the committed person is isolated from the public for the public's protection. While a rational "alternative purpose," i.e., treatment of the com-

ination of the sexually-dangerous-person proceeding surely reveals, in any event, that it is at least "quasi-criminal" and thus sufficient to implicate the protection of the Fifth Amendment. As noted, both above and in the original brief, the proceeding arises only in the context of a criminal prosecution, is conducted much like a criminal trial and results in an indeterminate, perhaps lifelong, commitment to a penal facility. For all these reasons, the sexually-dangerous-person proceeding must be considered a "criminal case" under the principles of *United States* v. *Ward*.

This Honorable Court must keep its Fifth-Amendment decision in *Ward* in mind in resolving the issue presented in the instant case. The Court's decisions in *Specht* v. *Patterson*, *In re Gault* and *Estelle* v. *Smith* are also pertinent to the Court's inquiry here. The State's brief fails to confront those cases, instead choosing to ignore them through the expedient, but factually deceptive, process of labeling the sexually-dangerous-person proceeding as a simple involuntary mental-health commitment process. The State's approach to the case law is no sounder than its labeling process.

C. The State's Reliance On Cases Such As *Mathews* v. *Eldridge*, 424 U.S. 319 (1976)—To Balance Interests In Having The Privilege Apply In A Sexual-Dangerousness Proceeding—Is Totally Misplaced. The Case Is Of Dubious Relevance To The Question Presented Here And, In Any Event, Does Not Support The State's Position.

Like the Illinois Supreme Court in its decision below, the State forwards this Court's decision in *Mathews* v.

---

mitted person, is assignable to the commitment, the indeterminate commitment to a penal facility "appears excessive in relation to the alternative purpose assigned"—especially when compared to the "true" mental-health commitment.

Eldridge for the proposition that the privilege against self-incrimination should not apply in an Illinois sexually-dangerous-person proceeding. According to the State, the privilege is not applicable to the proceeding under the direct "criminal-case" language of the Fifth Amendment. Nevertheless, the State continues, the privilege may be applicable as a matter of fundamental fairness under the broad contours of the due-process clause. Due process requires, though, an "accommodation of competing interests," the key to which is determining "the probable value, if any, of [an] additional procedural safeguard" (Brief for Respondent at 22, citing *Mathews* v. *Eldridge*). The State then goes on to argue that fundamental fairness does not require application of the privilege (Brief for Respondent at Part B) because the privilege would serve no useful and distinctive purpose (*Id.* at Part C) and would in fact thwart the diagnostic and treatment purposes of the proceeding (*Id.* at Part D).

The shortcomings of the State's brief in regard to addressing direct Fifth-Amendment jurisprudence have been discussed at length above. Shortcomings just as obvious appear, however, as to the due-process aspect of the State's brief.

It is clear, first of all, that the State's due-process analysis under *Mathews* v. *Eldridge* is ill-suited for resolution of the issue presented here. *Mathews*, after all, dealt with the termination of Social Security disability benefits and looked to determine the due-process sufficiency of the administrative procedures used for the termination. The applicability of the privilege against self-incrimination, though, is a different inquiry, one not concerned with a due-process balancing of interests. That much is clear from this Court's handling of Fifth-Amendment privilege claims in cases such as *In re Gault*, 387 U.S. 1 (1967),

United States v. *Ward*, 442 U.S. 242 (1980) and *Estelle* v. *Smith*, 451 U.S. 454 (1981), none of which involve due-process analysis.[8]

Even if the State, like the Illinois Supreme Court before it, is correct in urging a due-process balancing of interests in the instant case, that balancing would not disfavor the privilege against self-incrimination, as the State suggests in its brief.

It must be noted here, too, that the State is simply unwilling to come to grips with the realities of the sexually-dangerous-person proceeding in its analysis of the first factor from *Mathews* v. *Eldridge*, the private interest involved in the proceeding at issue. The State (at pages 25-26 of brief) denigrates both the "massive curtailment of liberty" [*Humphrey* v. *Cady*, 405 U.S. 504, 509 (1972)] and the severe societal stigma [*United States ex rel. Stachulak* v. *Coughlin*, 520 F.2d 431, 936 (7th Cir. 1973), *cert. denied*, 424 U.S. 947 (1976)] involved in an adjudication of sexual dangerousness. The indeterminate, perhaps lifelong, commitment to a penal institution following such an adjudication simply cannot be compared with the revocation of a conditional liberty [e.g., *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973) and *Minnesota* v. *Murphy*, 465 U.S. 420 (1984)] or with the temporally limited and systematically reviewed commitment to a mental-health facility [e.g., *Addington* v. *Texas*, 441 U.S. 418 (1979) and *Parham* v. *J.R.*, 442 U.S. 584 (1979)], as the State has done. Furthermore, while "reputation *alone*" may not be

---

[8] As pointedly noted by the American Psychiatric Association in its brief as *amicus curiae* (at page 22), a due-process balancing of interests would almost certainly result in the privilege's being "balanced away," even in a formal criminal prosecution, since proceeding without a privilege would always serve a compelling governmental need.

a constitutionally protected interest (Brief for Respondent at 25; emphasis added), it certainly gains such stature when combined with an indefinite commitment to a penal institution, a commitment which can exceed in length the sentence of a formally convicted sex offender. *See Stachulak* v. *Coughlin; People* v. *Burnick*, 14 Cal. 3d 306, 121 Cal. Rptr. 488, 535 P.2d 352 (1975). The State hardly persuades with its understatement of the private interest involved in the sexually-dangerous-person proceeding.

The State is no more persuasive in its discussion of the second interest to be weighed under *Mathews* v. *Eldridge*, the probable value of the sought-after procedural safeguard. The State takes pains to contrast and confuse the positions of the petitioner and *amici* regarding the "societal values to be promoted by the Fifth Amendment" (Brief for Respondent at 27, n. 12). Suffice it to say that reliability is a concern of the privilege (*In re Gault*, 387 U.S. at 44-45) and that an acknowledgement of guilt by a person, "especially one of defective mentality or peculiar temperament," is suspect. *Id. See also Blackburn* v. *Alabama*, 361 U.S. 194 (1960). The State makes a number of other claims in response but none withstand analysis. The State notes that the petitioner has made no claim of actual coercion (Brief for Respondent at 29). But, as this Court noted in *New Jersey* v. *Portash*, 440 U.S. 450 (1974), statements made under legislative compulsion are the essence of coerced statements. Here, the petitioner was subjected to compulsory psychiatric examinations and was obliged to talk. That circumstance itself establishes coercion. The State also asserts that the examining psychiatrists were not concerned with the truth or falsity of the petitioner's statements in determining his mental condition and that, as a result, there should be no concern with the possibility of false statements in the sexually-

dangerous-person proceeding. Here, too (see above at Part A, n.3), the State ignores that the proceeding involves more than findings of mental condition, that it goes beyond that to the objective findings of the person's having demonstrated his propensities toward the commission of sex offenses. The grave danger of a false statement of guilt as to these findings is apparent.[9]

Another claim of the State is common to its discussion of both the second and third factors of *Mathews* v. *Eldridge*. In this regard, the State asserts that it cannot "shoulder the entire load" [*Murphy* v. *Waterfront Comm'n.*, 378 U.S. 52, 55 (1964) (citation omitted)] in a sexually-dangerous-person proceeding or produce the necesary evidence in such a proceeding "by the independent labors of its officers" [*Culombe* v. *Connecticut*, 367 U.S. 568, 582 (1961)] and must instead have the "best evidence" in the case, the person's own statements, even over his claim of the privilege against self-incrimination (Brief for Respondent at 31-32). In a related vein, directed to the third *Mathews* factor—the State's interest in proceeding

---

[9] In regard to the State's claim that a Fifth-Amendment privilege would serve no useful purpose in a sexually-dangerous-person proceeding, it should also be noted that the State ignores other procedural functions of the privilege itself. It seems clear that, if no privilege obtains, the subject of the sexual-dangerousness petition could be required to assume the stand during the proceeding. That surely would present the situation of the person's becoming an active participant in his own commitment. That, in turn, would add still another distinction from the "true" mental-health commitment procedure, where the subject cannot be obliged to testify as an adverse witness since he does enjoy a privilege of silence. *See generally In re Collins*, 102 Ill. App. 3d 138, 429 N.E.2d 531, 538 (1981) (referring to Ill. Rev. Stat. ch. 91½, §2-100, guaranteeing civil-commitment subject "all rights, benefits or privileges" guaranteed by law or the Constitution).

without the procedural safeguard—the State asserts that application of the privilege "would thwart the diagnostic and treatment purposes of the proceedings" (*Id.* at 33-35). The State's assertions miss the mark. While it may be desirable to have expert testimony on the person's mental condition in the sexually-dangerousness proceeding, it is simply not true that that testimony must be based on the person's own words during a psychiatric examination. As this Court has recognized, an expert can properly form an opinion of a person's mental condition through review of previously collected materials or in response to a hypothetical question, all without a personal examination of the subject. *Barefoot* v. *Estelle*, 463 U.S. 880, 903-04 (1983). *See also* the brief of the American Psychiatric Association as *amicus curiae* at 23. The Sexually Dangerous Persons Act obviously poses no bar to that type of opinion evidence. *See, e.g., People* v. *Covey*, 34 Ill. 2d 195, 215 N.E.2d 220, 222 (1966) (expert in sexual-dangerousness proceeding may give opinion based on "the personal observations of the expert or on the evidence of other witnesses detailing facts and circumstances which tend to show the mental disorder") and *People* v. *Cooper*, 64 Ill. App. 3d 880, 381 N.E.2d 1178, 1183 (1978) (expert in such proceeding may consider customarily utilized psychological reports, such as results of personality test).

The State's second assertion—that application of the privilege would thwart the diagnostic and treatment purposes of the sexually-dangerousness proceeding—is equally misguided. No treatment occurs at the point at issue here—during examination by a non-treating psychiatrist in advance of the sexual-dangerousness hearing. Even the treatment involved in the proceeding, i.e., that following the formal hearing and adjudication, would hardly be affected at all. *See In re Gault*, 387 U.S. 1, 51 (1967) (debunking notion that compulsory self-incrimina-

tion is "good for the soul" as the commencement of therapy). *See also* Dolan Report, which notes that the treatment director gives the sexually dangerous person an absolute right to refuse treatment altogether (Report at 2). The effect of the privilege upon the diagnostic aspect of the proceeding is likewise dubious. Importantly, in a point conspicuously ignored by the State, Illinois has concluded that "application of the privilege against self-incrimination does not seriously impair the State's ability to achieve the valid objectives of civil commitment." *Matter of Rizer*, 87 Ill. App. 3d 795, 409 N.E.2d 383, 386 (1980).

In light of all this, this Court must conclude that the State's reference to *Mathews* v. *Eldridge* cannot help its cause. The case and the due-process balancing of interests it suggests are hardly pertinent to the issue presented here. Even if they were, the various interests, properly set forth and balanced, do not militate against application of the privilege against self-incrimination to the Illinois sexually-dangerous-person proceeding. Even under *Mathews*, the privilege should be found applicable.[10]

---

[10] The State also argues in a separate point (Brief for Respondent at Part II) that even if this Court finds the privilege applicable, it should declare that the privilege is not self-executing and thereby deny relief to the petitioner. In this regard the State relies on points advanced but rejected in *Estelle* v. *Smith*, 451 U.S. 454 (1981). For that reason, extended reply is unnecessary.

The petitioner would note, however, that the State's reliance on the presence of counsel in this proceeding (Brief for Respondent at 37-38) is misguided. As noted by the Illinois Supreme Court, there is not now and has never been a privilege of silence in an Illinois sexual-dangerousness proceeding. *People* v. *Allen*, 107 Ill. 2d 91, 481 N.E.2d 690 (1985). Given this fact, counsel could not have advised petitioner to assert a privilege since he would have only involved his client in contempt proceedings. *See, e.g., People* v. *Redlich*, 401 Ill. 270, 83

CONCLUSION

For the reasons set forth here and in petitioner's original brief, this Honorable Court should reverse the order of the Illinois Supreme Court approving petitioner's adjudication and commitment as a sexually dangerous person.

RESPECTFULLY SUBMITTED,
ROBERT AGOSTINELLI
Deputy Defender
VERLIN R. MEINZ
*PETER A. CARUSONA
Assistant Defenders
Office of the State Appellate Defender
628 Columbus Street-Suite 308
Ottawa, Illinois 61350
(815) 434-5531
Counsel for Petitioner

Of Counsel
JEAN HERIGODT
Assistant Public Defender
6107 N. Sauganish
First Floor
Chicago, Illinois 60646
(312) 545-2953
**Counsel of Record*

N.E.2d 736 (1949).

The petitioner also notes the State's passing claim of deliberate waiver, i.e., that petitioner sought sexual-dangerousness adjudication. That claim is based only on off-hand observation of one examining psychiatrist, an observation undeveloped by the State at the dangerousness hearing. Moreover, that claim—like every other claim of waiver—was specifically rejected by the only court to pass on it. *See People* v. *Allen*, 123 Ill. App. 3d 669, 463 N.E.2d 135 (1984), *rev'd on other grounds*, 107 Ill. 2d 91, 481 N.E.2d 690 (1985).

Supreme Court, U.S.
FILED
JAN 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-5404

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TERRY B. ALLEN,

Petitioner,

v.

STATE OF ILLINOIS,

Respondent.

On Writ of Certiorari to the Illinois Supreme Court

BRIEF OF THE AMERICAN PSYCHIATRIC ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

JOEL I. KLEIN
(Counsel of Record)
JOANN E. MACBETH
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184
Counsel for Amicus Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
STATEMENT	2
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION SHOULD APPLY TO PROCEEDINGS UNDER THE ILLINOIS SEXUALLY DANGEROUS PERSONS ACT BECAUSE THEY ARE ESSENTIALLY CRIMINAL IN NATURE AND EFFECT	7
A. Sexually Dangerous Persons Statutes Expose Offenders To Consequences That Are Similar To, And Potentially More Severe Than, Those That Follow A Criminal Conviction	10
B. The Provision of Treatment To Those Committed Under Sexually Dangerous Persons Statutes Does Not Provide An Adequate Justification For Abrogating The Fifth Amendment Privilege	16
C. The Court Below Mistakenly Relied on *Mathews v. Eldridge*, 424 U.S. 319 (1976), In Deciding Whether The Privilege Against Self-Incrimination Should Apply To A Sexually Da gerous Person Proceeding	21
CONCLUSION	24

TABLE OF AUTHORITIES

Cases: Page

Addington v. Texas, 441 U.S. 418 (1979) 6, 21
Barefoot v. Estelle, 463 U.S. 880 (1983) 14, 23
Commonwealth v. Barboza, 387 Mass. 105, 438 N.E.2d 106, *cert. denied*, 459 U.S. 1020 (1982) 13
Commonwealth ex rel. Finken v. Roop, 339 A.2d 764 (Pa. Super. 1975), *cert. denied*, 424 U.S. 960 (1976) 18
Cramer v. Tyars, 23 Cal. 3d 131, 588 P.2d 793 (1979) 18
Cross v. Harris, 418 F.2d 1095 (D.C. Cir. 1969) 17
Denton v. Commonwealth, 383 S.W.2d 681 (Ky. 1974) 19
Estelle v. Smith, 451 U.S. 454 (1981) ..... *passim*
French v. Blackburn, 428 F. Supp. 1351 (M.D.N.C. 1977), *aff'd summarily*, 443 U.S. 901 (1979) 18
Gagnon v. Scarpelli, 411 U.S. 778 (1973) 16
Haskett v. State, 255 Ind. 206, 263 N.E.2d 529 (1970) 13
Humphrey v. Cady, 405 U.S. 504 (1972) 12, 19
In re Andrews, 334 N.E.2d 15 (Mass. 1975) 15
In re Beverly, 342 So.2d 481 (Fla. 1977) 18
In re Feld, 412 A.2d 1032 (N.H. 1980) 18
In re Gault, 387 U.S. 1 (1967) ..... *passim*
In re Helvenston, 658 S.W.2d 99 (Tenn. App. 1983) 18
In re Matthews, 46 Or. App. 757, 613 P.2d 88 (1980), *cert. denied*, 450 U.S. 1040 (1981) 18
In re Winstead, 425 N.E.2d 943 (Ohio App. 1980) 18
Jurek v. Texas, 428 U.S. 262 (1976) 23
Lefkowitz v. Cunningham, 431 U.S. 801 (1977) 22
Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972) (three-judge court), *remanded for more specific order*, 414 U.S. 473 (1974), *order on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded*, 421 U.S. 957, *reinstated on remand*, 413 F. Supp. 1318 (E.D. Wis. 1976) 19
Mathews v. Eldridge, 424 U.S. 319 (1976) 5, 7, 21-22
McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972) 13
Minnesota v. Murphy, 104 S. Ct. 1136 (1984) 15

TABLE OF AUTHORITIES—Continued

	Page
Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940)	10, 12
Miranda v. Arizona, 384 U.S. 436 (1966)	7, 24
Morrissey v. Brewer, 408 U.S. 471 (1972)	15-16, 22
Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964)	22
O'Connor v. Donaldson, 422 U.S. 563 (1975)	16
Parham v. J.R., 442 U.S. 584 (1979)	20
People v. Allen, 123 Ill. App.3d 669 (1984)	4
People v. Chapman, 301 Mich. 584, 4 N.W.2d 18 (1942)	13
People v. Pembrock, 62 Ill.2d 317, 342 N.E.2d 18 (1976)	12-13
Specht v. Patterson, 386 U.S. 605 (1967)	9-10, 12, 13
State ex rel. Kiritsis v. Marion Probate Court, 381 N.E.2d 1245 (Ind. 1978)	18
State v. McCarter, 91 Wash.2d 249, 588 P.2d 745 (1978)	11
State v. O'Neil, 545 P.2d 97 (Or. 1976)	18
Suzuki v. Quisensberry, 411 F. Supp. 1113 (D. Hawaii 1976)	19
Tyars v. Finner, 518 Supp. 502 (C.D. Cal. 1981)	18-19
United States ex rel. Stachulak v. Coughlin, 520 F.2d 931 (7th Cir. 1975)	*passim*
Vitek v. Jones, 455 U.S. 480 (1980)	23

Statutes:

Ill. Rev. Stat. ch. 38, § 105-1.01 *et seq.* (1981)	*passim*
Ill. Rev. Stat. ch. 91½, § 3	19

Other Authorities:

Abel, *et al.*, "An Integrated Treatment Program for Rapists," in *Clinical Aspects of the Rapist* (R. Rada, ed., 1978)	18
American Correctional Association, *Directory of Juvenile and Adult Correctional Agencies* (1984)	14
American Psychiatric Association, *Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry* (1985)	24

TABLE OF AUTHORITIES—Continued

Page

American Psychiatric Association Task Force Report, *Clinical Aspects of the Violent Individual* (1974) 14

Beis, *State Involuntary Commitment Statutes*, 7 Mental Disability Law Reporter 358 (July-August, 1983) 19

Berlin & Meinecke, *Treatment of Sexual Offenders With Antiandrogenic Medications*, 138 Amer. J. Psychiat. 601 (1981) 18

Dix, "Special Dispositional Alternatives for Abnormal Offenders," in *Mentally Disordered Offenders* (J. Monahan & H. Steadman, eds., 1983) 11, 12

Favole, "Mental Disability in the American Criminal Process," in *Mentally Disordered Offenders* (J. Monahan & H. Steadman, eds., 1983) 10, 11, 12

J. Goldstein, *et al., Criminal Law: Theory and Process* (1974) 15

Gove & Fain, *A Comparison of Voluntary and Committed Psychiatric Patients*, 34 Arch. Gen. Psychiat. 669 (1977) 20

Group for the Advancement of Psychiatry, *Psychiatrically Deviated Sex Offenders* (1950) 11

Group for the Advancement of Psychiatry, *Psychiatry and Sex Psychopath Legislation: The 30's to the 80's* (1977) 8, 10, 11, 16-17

Guttman, *MSDO Law: The Assumption Challenged*, 4 Crim. Justice J. 75 (1980) 23

S. Halleck, *Psychiatry and the Dilemmas of Crime* (1967) 15

J. Monahan, *The Clinical Prediction of Violent Behavior* (1981) 14

Monahan & Davis, "Mentally Disordered Sex Offenders," in *Mentally Disordered Offenders* (J. Monahan & H. Steadman, eds., 1983) 14

Money, *et al.*, "Combined Antiandrogenic and Counselling Programs for Treatment of 46, XY and 47, XYY Sex Offenders," in E. Sacher, *Hormones, Behavior, and Psychopathology* (1976) 18

TABLE OF AUTHORITIES—Continued

Page

Morrow & Peterson, *Follow-up of Discharged Psychiatric Offenders "Not Guilty by Reason of Insanity" and Criminal Sex Psychopaths*, 57 J. Crim. L., Criminology & Police Science (1966).. 17-18

Ransley, *Repeal of the Wisconsin Sex Crimes Act*, 1980 Wisc. L. Rev. 941 12

Resnick & Wolfgang, "New Directions in the Treatment of Sex Deviance," in *Sexual Behaviors: Social, Clinical, and Legal* Aspects (Resnick & Wolfgang, eds., 1972) 17

J. Robitscher, *The Powers of Psychiatry* (1981).... 15

Steadman, *et al.*, *Mentally Disordered Offenders: A National Survey of Patients and Facilities*, 6 Law and Human Behavior 31 (1982) 12

Stromberg, "Developments Concerning the Legal Criteria for Civil Commitment: Who Are We Looking For?" in *Psychiatry 1982: Annual Review* (L. Grinspoon, ed., 1982) 19

Sturgeon & Taylor, *Report of a Five-Year Follow-up Study of Mentally Disordered Sex Offenders from Atascadero State Hospital in 1973*, 4 Crim. Justice J. of Western State Univ. 31 (1980) 17

Sutherland, *The Diffusion of Sexual Psychopath Laws*, 56 Amer. J. Sociology 142 (1950) 10

Swanson, *Sexual Psychopath Statutes: Summary and Analysis*, 51 J. Crim. L., Criminology & Police Science 215 (1960) 10

Task Panel on Legal and Ethical Issues of the President's Commission on Mental Health (1978) 11-12

U.S. Dep't of Justice, *Bureau of Justice Statistics: Prison Admissions and Releases, 1982* (1985).... 14

Van Duizend, *et al.*, *An Overview of State Involuntary Civil Commitment Statutes*, 8 Mental Disability Law Reporter 328 (May-June, 1984).. 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-5404

TERRY B. ALLEN,

Petitioner,

v.

STATE OF ILLINOIS,

Respondent.

On Writ of Ce tiorari to the Illinois Supreme Court

BRIEF OF THE AMERICAN PSYCHIATRIC ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The American Psychiatric Association ("APA"), founded in 1844, is the nation's largest organization of qualified doctors of medicine specializing in psychiatry. Approximately 32,000 of the nation's 40,000 psychiatrists are members. The Association has participated as amicus curiae in numerous cases involving psychiatric issues, including *Smith v. Sielaff* (No. 85-5487), *Metropolitan Life Insurance Co. v. Massachusetts*, 105 S.Ct. 2380 (1985), *Ake v. Oklahoma*, 105 S.Ct. 1087 (1985), *Barefoot v. Estelle*, 463 U.S. 880 (1983), *Youngberg v. Romeo*, 457 U.S. 307 (1982), *Mills v. Rogers*, 457 U.S.

291 (1982), *Estelle v. Smith*, 451 U.S. 454 (1981), *Parham v. J.R.*, 442 U.S. 584 (1979), *Addington v. Texas*, 441 U.S. 418 (1979), and *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

In recent years, the APA has been actively involved in examining the role of psychiatrists as expert witnesses and consultants in both criminal cases and civil commitment proceedings. It has focussed specifically on the role of psychiatrists in predicting future dangerousness in a variety of legal contexts as well as on the extent to which confidentiality and other traditional protections generally afforded by psychiatrists are appropriate in these contexts. The instant case involves sexually dangerous persons proceedings, which historically have been thought to embody elements of criminal proceedings and elements of civil commitment proceedings. Based on its prior work, the APA believes that it can make an important contribution to the Court's consideration of the issues presented here. In addition, because psychiatrists have the principal responsibility for providing testimony in sexually dangerous persons proceedings, as well as for treating those who are adjudicated to be sexually dangerous, the resolution of this case is likely to affect the work of the APA's members.

The parties have consented to the filing of this brief. Their letters of consent have been lodged with the Clerk.

STATEMENT

Petitioner Terry B. Allen was charged on October 14, 1982, with having committed the crimes of unlawful restraint and deviate sexual assault. On November 5, 1982, the state petitioned to have Allen declared a sexually dangerous person under the Sexually Dangerous Persons Act. Ill. Rev. Stat. ch. 38, § 105-1.01 *et seq.* (1981).[1] The crim-

[1] Section 1.01 of that statute provides:

> All persons suffering from a mental disorder, which mental disorder has existed for a period of not less than one year

inal charges were subsequently dismissed at a preliminary hearing for lack of probable cause. Allen was then recharged by indictment, after which the petition to declare him sexually dangerous was reinstated.

Pursuant to the sexually dangerous persons statute, Allen, while in custody, was ordered to submit to two psychiatric examinations. The trial on the petition was then held on March 4, 1983. Dr. Colen, the first psychiatrist to testify, stated that he had interviewed Allen for 45 minutes to an hour on November 11, 1982.[2] Asked about the evaluation process, he said that he "[t]alked with [Allen] about the offense surrounding the alleged charge, some historical information, did a mental status evaluation, and then came to some conclusions and dictated that in a report." (Tr. 9.)[3] Dr. Colen concluded that Allen was a sexually dangerous person and that he had "criminal propensities to commit sex crimes." (Tr. 28.)[4] He acknowledged that these opinions were "primarily" based on Allen's statements. (Tr. 21, 43-44.)

---

immediately prior to the filing of the petition hereinafter provided for, coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children, are hereby declared sexually dangerous persons.

[2] In his report of that date, Dr. Colen summarized Allen's statements regarding both the assault that led to the instant proceedings and his prior sexual assaults. The report also quoted Allen as saying, "it was against her will, I couldn't control myself," and "I have done this before."

[3] Transcript citations are to the original trial court transcript of the sexually dangerous person proceeding.

[4] While the court sustained the objections of Allen's attorney to testimony by the psychiatrists as to the content of the statements made by Allen during the psychiatric examinations, it nevertheless permitted the psychiatrists to state their conclusions as to whether Allen was a sexually dangerous person even though those opinions were based largely on what Allen told the psychiatrists. (Tr. 14-15, 23-25.)

Dr. Mortimer Beck, the other psychiatrist to have examined Allen, also testified that he had a propensity for committing sexual assaults. Dr. Beck's opinion was based on (1) Allen's statements that there had been more than one such incident, (2) Allen's failure to receive treatment, and (3) Allen's statement that he could not stop himself. (Tr. 58.)[5] Dr. Beck further indicated that his conclusion that Allen suffered from a mental disorder rested largely on Allen's own statements about his past history and condition. (Tr. 62.) Based on the testimony of the psychiatrists, as well as that of the victim concerning Allen's sexual assault of her,[6] the trial court found Allen to be a sexually dangerous person. He was then committed to the Department of Corrections for an indeterminate period of time.

The Illinois Court of Appeals for the Third District reversed on the ground that Allen's privilege against self-incrimination had been violated by the use of psychiatric testimony based on his unwarned statements. *People v. Allen*, 123 Ill. App.3d 669 (1984). Finding this Court's decision in *Estelle v. Smith*, 451 U.S. 454 (1981), to be "directly applicable," the intermediate appellate court held that "the trial court could not rely solely on the defendant's unwarned statements to the psychiatrists to find the defendant a sexually dangerous person." 123 Ill. App.3d at 671.[7]

---

[5] Dr. Beck's report of his November 12, 1982, examination stated that Allen had "admitted to the incident alleged" and that he had discussed other sexual assaults that he had committed.

[6] According to the victim, Allen surreptitiously entered her car, and ultimately simulated intercourse with her and forced her to perform fellatio on him. (Tr. 76-80.)

[7] The Court of Appeals interpreted the Sexually Dangerous Persons Act to require specific proof of more than one act of sexual assault. Starting from this predicate, it concluded that the state had relied on the psychiatrists to make its entire case because the victim had only testified about one act. Thereafter, the Illinois Supreme Court interpreted the Act to require proof of only one act, and

The Illinois Supreme Court reversed the decision of the Court of Appeals. It held that the privilege against self-incrimination was not available in sexually dangerous person proceedings because they are "essentially civil in nature," the aim of the statute being to provide "treatment, not punishment." Pet. App. 4, 5. The court also found support for its ruling in this Court's decision in *Mathews v. Eldridge*, 424 U.S. 319 (1976). Applying the factors set out there for evaluating a procedural due process claim, the court concluded, "[s]ince the self-incrimination privilege would be a great burden to the State while being of minimal value in assuring reliability, the *Eldridge* test totally supports [our] holdng . . . that due process does not require the application of the privilege." Pet. App. 7.

SUMMARY OF ARGUMENT

The basic issue presented by this case is whether the Fifth Amendment privilege against self-incrimination applies to a proceeding under the Illinois Sexually Dangerous Persons Act. In our view, the Court should answer this question in the affirmative, recognizing that such proceedings are substantially equivalent to criminal proceedings and significantly different from civil commitment proceedings, to which the privilege does not, and should not, apply.

1. Established principles make clear that the application of the Fifth Amendment privilege depends on the substance of the state proceedings, and not on any civil or criminal label that might attach to them. *See In re Gault*, 387 U.S. 1 (1967); *Estelle v. Smith*, 451 U.S. 454 (1981). In Illinois—as in other states that have similar laws—the purpose, nature and effects of a sexually dan-

---

concluded that the victim's testimony was sufficient to satisfy this criterion in the instant case. Pet. App. 9-10.

gerous person adjudication all demonstrate that these proceedings are fundamentally punitive in substance. While they focus in part on a person's mental condition, they also depend explicitly on proof of a serious criminal act. *See* Pet. App. 9. In recognition of this fact, sexually dangerous person proceedings in Illinois are generally subject to the same procedural requirements as is a criminal trial, including a right to a jury trial, Ill. Rev. Stat. ch. 38, § 105.5 (1981), and a requirement of proof beyond a reasonable doubt. *Id.* at § 105-3.01. The result of being adjudicated a sex offender, moreover, is confinement—usually for several years and potentially for life—in a setting that has most if not all of the punitive and security aspects that characterize a prison.

2. Although psychiatric treatment is supposedly provided to those who are confined as sexually dangerous, that fact alone does not alter the basic criminal nature of these proceedings. There is reason to question not only the availability of such treatment, but also its effectiveness in remedying the sexually dangerous propensities of many offenders. Moreover, even when treatment is provided, the overall nature of the confinement still remains largely punitive, much as a delinquency adjudication or criminal sentence does despite the availability of rehabilitative and treatment programs. In this regard, sexually dangerous person proceedings are significantly different from civil commitment proceedings, as to which the vast majority of courts have held that the self-incrimination privilege does not apply. In civil commitment, the state acts primarily in a benevolent capacity to provide treatment to persons who have committed no crime. *See Addington v. Texas*, 441 U.S. 418 (1979). The hospitals to which such persons are sent are typically not punitive in design, and people are generally hospitalized for reasonably brief periods, during which time effective treatment usually can be, and often is, provided.

3. Reliance by the court below on the principles of *Mathews v. Eldridge*, *supra*, to find that the Fifth Amendment privilege should not apply was misguided. Those principles were designed for assessing due process claims in administrative proceedings, and have not been, nor should they be, used for evaluating a claim to a specific constitutional protection like the privilege against self-incrimination. In particular, *Eldridge's* concerns with the reliability of the proceedings and the government's ability to prove its case are simply inadequate to protect the different interests served by the privilege. *See In re Gault*, *supra*. It is also worth noting that, contrary to the view of the Illinois Supreme Court, application of the privilege need not thwart the state's legitimate interests in confining and treating sexually dangerous offenders.

I. THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION SHOULD APPLY TO PROCEEDINGS UNDER THE ILLINOIS SEXUALLY DANGEROUS PERSONS ACT BECAUSE THEY ARE ESSENTIALLY CRIMINAL IN NATURE AND EFFECT.

The Fifth Amendment privilege against self-incrimination requires that when a state seeks "to punish an individual [it must] produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (citations omitted). "[T]he privilege," as this Court has explained, "reflects the limits of the individual's attornment to the state and —in a philosophical sense—insists upon the equality of the individual and the state." *In re Gault*, 387 U.S. 1, 47 (1967). The Illinois Supreme Court believed that, by attaching the label "civil" to proceedings under its Sexually Dangerous Persons Act, the state could ignore this basic protection and thereby compel a defendant to provide information that can lead to his indefinite confine-

ment. This Court has made clear, however, that, for Fifth Amendment purposes, it is inappropriate to "disregard substance because of the feeble enticement of the 'civil' label-of-convenience" attached to a proceeding. *Id.* at 50. Instead, the proper inquiry for determining when the privilege applies requires an assessment of "the nature of the statement or admission and the exposure which it invites." *Id.* at 49.

There can be no doubt, as an initial matter, that "the nature of the statement[s] or admission[s]" elicited during a court-ordered psychiatric evaluation under the Illinois statute are within the compass of the Fifth Amendment's protection. The basis for the psychiatrists' adverse conclusions about petitioner—much as in *Estelle v. Smith*, *supra*, 451 U.S. at 463-65 & n.8—rested expressly on the substance and content of his statements and admissions. *See* pp. 3-4 *supra*. Indeed, psychiatric opinions in sexually dangerous person (or "sex psychopath") proceedings, *even on the question of mental illness*, often rely, to an unparalleled degree, on an individual's admission of sexual offenses. *See* Group for the Advancement of Psychiatry, *Psychiatry and Sex Psychopath Legislation: The 30's to the 80's* 866 (1977) ("[t]he circularity of this relationship [between the offense and a person's mental state] is repeatedly demonstrated by identifying the special sex offender on the basis of minimal evidence of psychopathology and instead inferring mental illness from the act itself.") (hereinafter cited as "GAP Report").

The only open issue in this case, therefore, is whether the "exposure" that a person faces on the basis of his compelled admissions in a sex psychopath case is sufficiently criminal to warrant application of the Fifth Amendment privilege. That question, in turn, can be answered by looking at the purpose and nature of sex psychopath proceedings, and, most significantly, at the con-

sequences that result from being adjudicated a sexually dangerous person. *See In re Gault, supra*, 387 U.S. at 47-51; *Estelle v. Smith, supra*, 451 U.S. at 462-63. Viewed in those terms, it is clear that the privilege should apply in proceedings like the one at issue here.[8]

---

[8] The Illinois statute requires proof of 3 separate criteria: (1) mental disorder for more than a year; (2) criminal propensities to commit future sex offenses; and (3) the commission of at least one act of or attempt at sexual assault or molestation. Ill. Rev. Stat. ch. 38, § 105-1.01 (1981). *See* Pet. App. 9. The Illinois Supreme Court did not explicitly decide whether testimony based on a compelled psychiatric examination could be used to prove the third criterion since the victim's testimony was found adequate for this purpose in the present case. Pet. App. 9-10. The court did, however, make clear that "[i]t would have been proper to allow into evidence both the statements [made by Allen to the psychiatrists] themselves and the psychiatrists' conclusions based thereon." Pet. App. 8. Since those statements included information about the specific sexual assault committed by petitioner, *see* notes 2 & 5 *supra*, it appears that psychiatric testimony would be admissible with respect to all three statutory criteria. *See also* Pet. App. 8 ("defendants must answer all questions at such [psychiatric] examinations regardless of the possible incriminatory nature of the answers.").

Even assuming that psychiatric testimony were limited to the first two criteria, however, we nevertheless believe that the privilege should still apply since all of the criteria must be proved before a defendant can be confined under the statute. Indeed, even in a *post-conviction* sex psychopath proceeding, imposition of the sanction depends on "a new finding of fact that was not an ingredient of the offense charged." *Specht v. Patterson*, 386 U.S. 605, 608 (1967) (citation omitted). Thus, much as in *Estelle v. Smith, supra*, 451 U.S. at 463 & n.6—where the Court expressly noted that, under Texas law, psychiatric testimony based on a compelled examination could not be used to prove the crime, but only to prove the elements necessary for imposing a capital sentence—the privilege should apply whenever a defendant's statements are used to establish an essential element of the state's proof, whether it effects "guilt" in the narrow sense or, more broadly, a special "punitive disposition"—like an indeterminate sentence—that is potentially more severe than the penalty that otherwise would attach to the crime in question.

A. Sexually Dangerous Person Statutes Expose Offenders To Consequences That Are Similar To, And Potentially More Severe Than, Those That Follow A Criminal Conviction.

Special statutes for dealing with sexually dangerous persons were first enacted in this country in the late 1930's. *See, e.g., Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940). Today, approximately one-third of the states have such laws.[9] Although these statutes vary somewhat as to criteria and procedures,[10] their common genesis and purpose is clear: "Anxiety about sexual crimes, particularly those having violent overtones or involving children, often created the atmosphere for the passage of such legislation. The primary goal of public protection from threatening sexual behavior remained." GAP Report at 853. *See also* Sutherland, *The Diffusion of Sexual Psychopath Laws*, 56 Amer. J. Sociology 142 (1950). Historically, the heart of these statutes was their provision for indefinite confinement; they appeased the public demand for special protection against sex offenders with the promise that such people would be incarcerated until "cured." *See* GAP Report at 865, 867.[11]

If anything, the argument for the privilege is, in one respect, stronger here than in *Estelle v. Smith*, and than it would be in a case like *Specht v. Patterson*, since the guilt and dispositional questions are simultaneously determined in a single proceeding.

[9] As of January 1, 1980, 20 states had such statutes in effect. This is a declining number, however. *See* Favole, "Mental Disability in the American Criminal Process," in *Mentally Disordered Offenders* 270 (J. Monahan & H. Steadman, eds., 1983).

[10] A state-by-state description of the basic standards and procedures embodied in the various sex psychopath laws as of 1980 is contained in Favole, *supra* note 9, at 269-81. *See also* Swanson, *Sexual Psychopath Statutes: Summary and Analysis*, 51 J. Crim. L., Criminology & Police Science 215 (1960).

[11] Most statutes still provide for indeterminate confinement. Although Oregon amended its law to limit the initial confinement to the term of the sentence for the crime committed by a sex offender,

Consistent with their criminal focus, sex psychopath laws are limited in application to people who have already engaged in sexual misconduct. *See* Favole, *supra* note 9, at 270-81. In the large majority of states, such a proceeding can be instituted only after conviction for a sexual offense, although the type of crime necessary to trigger these statutes varies. *See* Dix, *supra* note 11, at 138. While the Illinois procedure may be invoked when a defendant is merely *charged* with a crime, the application of the statute nevertheless requires proof of the commission of a serious sex offense—an actual or attempted sexual assault or molestation—during the sexually dangerous person trial itself. *See* Pet. App. 9.

Although developed as an adjunct to the criminal law, sex psychopath dispositions initially were often considered potentially more humane and more effective than traditional sentences because they held out the promise of treatment and cure, as well as a period of confinement that was tailored to the individual needs of the defendant. *See, e.g.*, Group for the Advancement of Psychiatry, *Psychiatrically Deviated Sex Offenders* (1950). In more recent years, however, there has been an increasing recognition that the noble goals of these statutes simply have not been realized. For example, the Group for the Advancement of Psychiatry in its 1977 report concluded: "First and foremost, sex psychopath and sex offender statutes can best be described as approaches that have failed." GAP Report at 935. Similarly, the Task Panel on Legal and Ethical Issues of the President's Commission on

---

that period of confinement can be extended subject to further review procedures. *See* Dix, "Special Dispositional Alternatives for Abnormal Offenders," in *Mentally Disordered Offenders* 144-46 (J. Monahan & H. Steadman, eds., 1983). California had a similar procedure, but its sex psychopath law was repealed in 1982. *See id.* at 188. *See also State v. McCarter*, 91 Wash.2d 249, 588 P.2d 745 (1978) (state must prove continuing dangerousness if sex psychopath seeks review of confinement after expiration of maximum sentence).

Mental Health 132 (1978), urged that "[l]aws authorizing the involuntary confinement of sexual psychopaths . . . should be repealed." Between 1978 and 1982, eight states did in fact repeal such laws. *See* Favole, *supra* note 9, at 270. *See also* Ransley, *Repeal of the Wisconsin Sex Crimes Act*, 1980 Wisc. L. Rev. 941.[12]

The judicial response to these statutes has undergone a somewhat analogous evolution. Beginning with what might fairly be characterized as a "wait and see" attitude, *see Minnesota ex rel. Pearson v. Probate Court*, *supra*, 309 U.S. at 276-77, the Court in later years has adopted a more demanding approach. *See Specht v. Patterson*, 386 U.S. 605 (1967) (significant procedural due process required for a post-conviction sex psychopath disposition); *Humphrey v. Cady*, 405 U.S. 504 (1972) (equal protection challenge regarding absence of jury trial deemed substantial). The lower federal courts and the state courts have gone even further, frequently imposing procedural requirements typically associated with criminal cases. *See generally* Dix, *supra* note 11, at 166-75. In Illinois, "[f]or example, in addition to statutory rights to a hearing, jury trial and counsel, a defendant is entitled to the right to confront and cross-examine witnesses, . . . and the right to a speedy trial." *U.S. ex rel. Stachulak v. Coughlin*, 520 F.2d 931, 935 (7th Cir. 1975) (citations omitted). And, as *Stachulak* itself held, the state must also satisfy the criminal law burden of proof beyond a reasonable doubt. *See also People v. Pembrock*,

---

[12] The most recent data available indicate that in 1978 approximately 2500 people nationwide were then being confined pursuant to special sex offender laws; twelve hundred people were actually committed in 1978 itself. *See* Steadman, *et al.*, *Mentally Disordered Offenders: A National Survey of Patients and Facilities*, 6 Law and Human Behavior 31 (1982). In Illinois, approximately 25 people are currently confined under the Sexually Dangerous Persons Act.

62 Ill.2d 317, 342 N.E.2d 18 (1976), codified at Ill. Rev. Stat. ch. 38, § 105-3.01 (1981).[13]

These increasing demands for procedural rigor reflect the fact that the consequences suffered by someone who is adjudicated a sex psychopath are essentially criminal in nature. As this Court observed in *Specht v. Patterson, supra*, when considering Colorado's sex psychopath statute, "[t]he punishment under the . . . Act is *criminal punishment* even though it is designed not so much as retribution as it is to keep individuals from inflicting further harm." 386 U.S. at 608-09. (emphasis supplied). No less can be said of the Illinois statute at issue here.

After being adjudicated as sexually dangerous, a person is committed to the Department of Corrections to be confined indefinitely. Ill. Rev. Stat. ch. 38, § 105-8 (1981). Thus, he faces a potential loss of liberty that may well exceed the maximum sentence for even the most serious sex crime.[14] Moreover, there is no requirement in Illinois for any periodic review of a sexually dangerous person's confinement. Rather, he remains confined "until he can prove that he is no longer sexually dangerous," *United States*

---

[13] There has been relatively little litigation on the self-incrimination question presented here. While essentially the same issue was raised in this Court under Maryland's defective delinquent statute, the case was decided on another ground. *See McNeil v. Director, Patuxent Institution*, 407 U.S. 245 (1972). The state courts have divided on this issue. *Compare People v. Chapman*, 301 Mich. 584, 4 N.W. 2d 18 (1942), and *Commonwealth v. Barboza*, 387 Mass. 105, 438 N.E.2d 106, *cert. denied*, 459 U.S. 1020 (1982) (privilege does not apply), *with Haskett v. State*, 255 Ind. 206, 263 N.E. 2d 529 (1970) (privilege applies).

[14] In *United States ex rel. Stachulak v. Coughlin, supra*, for example, the defendant was charged with indecent solicitation of a child, a crime carrying a maximum penalty of one year imprisonment. He was adjudicated under the Illinois sexually dangerous persons statute, however, and, at the time of the Court of Appeals decision, had already served five years. 520 F.2d at 936 n.4.

ex rel. Stachulak v. Coughlin, *supra*, 520 F.2d at 936,[15] or he may be conditionally released, much like a prisoner who is placed on parole. Ill. Rev. Stat. ch. 38, § 105-10 (1981). And, while there is little available data on the length of time that sex psychopaths actually serve, a recent study suggests that in 1978 the *average* time nationally was just over two years. *See* Monahan & Davis, "Mentally Disordered Sex Offenders," in *Mentally Disordered Offenders* 193 (J. Monahan & H. Steadman, eds., 1983). By comparison, the *median* time served by all criminals released from state prisons during the years 1977-1982 was, depending on the year of release, between 16 and 19 months; even those who had been convicted for rape served *median* sentences during the same time period of between 32 months and 3 years. *See* U.S. Dep't of Justice, *Bureau of Justice Statistics: Prison Admissions and Releases, 1982*, at p. 8, Table 13 (1985).

This lengthy period of confinement for sex psychopaths, moreover, is served in a facility that is usually characterized by the same kind of security and punitive qualities that mark a prison setting. In Illinois, for example, sexually dangerous persons are sent to Menard Psychiatric Center—a special "hospital" for the "criminally insane" —where they are housed in single-occupancy, maximum security cells. *See* American Correctional Association, *Directory of Juvenile and Adult Correctional Agencies*, at Ill. 115 (1984). These special facilities are frequently very restrictive of individual liberty and, in certain respects, may provide their residents with even fewer rights

---

[15] This is not an easy matter to prove. *See Barefoot v. Estelle*, 103 S. Ct. 3383, 3406 (1983) (Blackmun, J., dissenting). Not only is it difficult to predict dangerousness (or non-dangerousness) with any reasonable degree of accuracy, it is also true that there is a general tendency to overpredict dangerousness because of the consequences of an erroneous prediction of non-dangerousness. *See* APA Task Force Report, *Clinical Aspects of the Violent Individual* 25 (1974); J. Monahan, *The Clinical Prediction of Violent Behavior* 86 (1981).

and protections than does a prison. *See generally* J. Goldstein, *et al.*, *Criminal Law: Theory and Process* 270-71 (1974) (comparing conditions and restrictions at a Massachusetts hospital for the criminally insane with those at a state prison). In any event, it is clear that the nature of confinement in such a facility is typically more like confinement in a prison than in a mental hospital. *See* J. Robitscher, *The Powers of Psychiatry* 76 (1981); S. Halleck, *Psychiatry and the Dilemmas of Crime* 249-51 (1967).

Finally, the stigma resulting from being adjudicated a sexually dangerous person is particularly serious. "Unlike . . . delinquency proceedings [to which the privilege nevertheless applies, *see In re Gault, supra*], these actions are not confidential, and an adjudication of sexual dangerousness is certainly more damning than a finding of juvenile delinquency." *U.S. ex rel. Stachulak v. Coughlin, supra*, 520 F.2d at 936. Indeed, an adjudication as a sexually dangerous person effectively stigmatizes a person as both criminal and mentally ill—or "bad" and "mad," to put it in the vernacular. *See also In re Andrews*, 334 N.E.2d 15 (Mass. 1975) ("a person adjudicated a [mentally disordered sex offender] receives a stigma at least as great as that flowing from a criminal conviction").

In sum, the "exposure" faced by a defendant in a sexually dangerous person proceeding is, in a real sense, similar to, if not more severe than, that faced by a criminal defendant.[16] The sole distinction relied on by the Illi-

---

[16] This exposure is also significantly different from that posed by a parole or probation revocation hearing, to which the privilege against self-incrimination has been held not to apply. *See Minnesota v. Murphy*, 104 S. Ct. 1136, 1147 n.7 (1984). In contrast to confinement as a sexually dangerous person, parole or probation "arises after the end of the criminal prosecution, including imposition of sentence. . . . Revocation deprives an individual, not of the absolute liberty to which every individual is entitled, but only of the conditional liberty properly dependent on observance of special

nois Supreme Court to avoid this conclusion was that "[a] person found to be sexually dangerous is to receive 'care and treatment . . . designed to effect recovery.'" Pet. App. 5, quoting Ill. Rev. Stat. ch. 38, § 105-8 (1981). We now turn to a consideration of that factor.

B. The Provision Of Treatment To Those Committed Under Sexually Dangerous Persons Statutes Does Not Provide An Adequate Justification For Abrogating The Fifth Amendment Privilege.

Although the provision of appropriate treatment to sexually dangerous people is certainly a laudatory goal, it is not a sufficient basis for eliminating the privilege against self-incrimination in sex psychopath cases. This Court rejected similar arguments in *Gault*, concluding that the privilege was applicable despite the rehabilitative focus of delinquency proceedings. 387 U.S. at 14-30. Likewise, there is no doubt that the provision of high quality programs for adult offenders would not permit the state to withdraw Fifth Amendment protections or other rights from those it seeks to criminally charge and convict. In other words, so long as a sanction remains essentially punitive, the state is not allowed to choose between providing treatment and respecting an individual's constitutional rights; it may not be constitutionally required to do the former, but in no event is it excused from observing the latter. *Cf. O'Connor v. Donaldson*, 422 U.S. 563, 585-87 (Burger, C.J., concurring).

It is also important to recognize that there is good reason to doubt whether treatment is actually being provided to many sex psychopaths. According to the Group for the Advancement of Psychiatry, while the amount of treatment varies in different locales, the fact is that "[c]onfinement in a hospital as a sexual psychopath may

---

parole [or probation] restrictions." *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). *See also Gagnon v. Scarpelli*, 411 U.S. 778, 781-83 (1973).

lead to no more therapy than a criminal receives in a prison." GAP Report at 926; *see id.* at 857-59. As the Seventh Circuit said in a case involving the Illinois statute, "[a]ll too often the promise of treatment has served only to bring an illusion of benevolence to what is essentially a warehouse operation for social misfits." *U.S. ex rel. Stachulak v. Coughlin*, *supra*, 520 F.2d at 936, quoting *Cross v. Harris*, 418 F.2d 1095, 1107 (D.C. Cir. 1969).

Even when treatment is made available, there may be reason to question its efficacy for sex offenders. Unlike many mentally ill people, for whom significant treatment potential exists, sex offenders have proven to be a highly treatment resistant group. One reason for this distinction is that many sex offenders, having been diagnosed as mentally ill on the basis of their sexual offenses, *see* p. 8 *supra*, lack "significant pathology such as psychosis, retardation, or major affective disorders." Sturgeon & Taylor, *Report of a Five-Year Follow-up Study of Mentally Disordered Sex Offenders from Atascadero State Hospital in 1973*, 4 Crim. Justice J. of Western State Univ. 31, 42 (1980). Traditional psychiatric treatments, however, are usually most effective when such pathology is present. In addition, the term sex psychopath (or sexually dangerous person) has been used to describe a broad spectrum of behaviors and disorders. *See* GAP Report at 840-41. Undifferentiated efforts to treat everyone who falls within such imprecise borders—an all too frequent approach, especially in the past—are almost certain to be unsuccessful.[17]

We should also point out, however, that, in recent years, developments with respect to the treatment of sexually

---

[17] Thus, studies from the not-so-distant past indicate little difference in the recidivism rate between treated and untreated sex offenders. *See* Resnick & Wolfgang, "New Directions in the Treatment of Sex Deviance," in *Sexual Behaviors: Social, Clinical, and Legal Aspects* 397 *et seq.* (H. Resnick & M. Wolfgang, eds., 1972); Morrow & Peterson, *Follow-up of Discharged Psychiatric Offenders*

dangerous people have been more encouraging. *See, e.g.*, Money, *et al.*, "Combined Antiandrogenic and Counselling Programs for Treatment of 46, XY and 47, XYY Sex Offenders," in E. Sacher, *Hormones, Behavior, and Psychopathology* 105 (1976); Berlin & Meinecke, *Treatment of Sexual Offenders With Antiandrogenic Medications*, 138 Amer. J. Psychiat. 601 (1981); Abel, *et al.*, "An Integrated Treatment Program for Rapists," in R. Rada, *Clinical Aspects of the Rapist* 161 (1978). Nevertheless, despite these positive developments, the overall efficacy of treatment for most sex offenders is, in our view, still not sufficiently well established to provide an adequate basis for converting the essentially punitive effects of a sex psychopath disposition into a benevolent governmental endeavor.

In support of its contrary view, the Illinois Supreme Court cited several cases involving the application of the privilege to *civil commitment* proceedings.[18] While it is true that this Court, by way of summary affirmance, *see French v. Blackburn*, 443 U.S. 901 (1979), as well as the great majority of other courts, has rejected the privilege in the civil commitment context,[19] the assumed comparabil-

---

"Not Guilty by Reason of Insanity" and Criminal Sex Psychopaths, 57 J. Crim. L., Criminology & Police Science 31 (1966).

[18] *See* Pet. App. 5-6, citing *French v. Blackburn*, 428 F. Supp. 1351 (M.D.N.C. 1977), *aff'd summarily*, 443 U.S. 901 (1979); *Cramer v. Tyars*, 23 Cal. 3d 131, 588 P.2d 793 (1979); *In re Beverly*, 342 So.2d 481 (Fla. 1977); *In re Matthews*, 46 Or. App. 757, 613 P.2d 88 (1980), *cert. denied*, 450 U..S 1040 (1981).

[19] In addition to the cases cited in note 18, *supra*, *see also In re Helvenston*, 658 S.W.2d 99 (Tenn. App. 1983); *In re Winstead*, 425 N.E.2d 943 (Ohio App. 1980); *In re Feld*, 412 A.2d 1032 (N.H. 1980); *State ex rel. Kiritsis v. Marion Probate Court*, 381 N.E.2d 1245 (Ind. 1978); *State v. O'Neil*, 545 P.2d 97 (Or. 1976); *Commonwealth ex rel. Finken v. Roop*, 339 A.2d 764 (Pa. Super. 1975), *cert. denied*, 424 U.S. 960 (1976). *Contra, Tyars v. Finner*, 518

ity of these two types of proceedings is unwarranted for several reasons.[20]

To begin with, civil commitment statutes are designed to serve a very different purpose from that served by sex psychopath statutes. In no state is proof of a criminal act ever a prerequisite to civil commitment. To the contrary, every state authorizes commitment solely on the ground that a person is mentally ill and dangerous to self. *See* Beis, *State Involuntary Commitment Statutes*, 7 Mental Disability Law Reporter 358 (July-August, 1983). While the states also allow commitment for those who are mentally ill and dangerous to others, even then the scope of "dangerousness" is by no means limited to the commission of criminal acts.[21]

F. Supp. 502 (C.D. Cal. 1981); *Suzuki v. Quisensberry*, 411 F. Supp. 1113 (D. Hawaii 1976); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972) (three-judge court), *remanded for more specific order*, 414 U.S. 473 (1974), *order on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded*, 421 U.S. 957, *reinstated on remand*, 413 F. Supp. 1318 (E.D. Wis. 1976); *Denton v. Commonwealth*, 383 S.W.2d 681 (Ky. 1974).

[20] Ironically, in Illinois, by statute, the privilege *does* apply to civil commitment proceedings. Ill. Rev. Stat. ch. 91½, § 3-208. While we think that such a result is certainly not constitutionally compelled, we nevertheless fail to see how Illinois can justify the use of the privilege in the non-punitive situation presented by civil commitment without extending it to sex psychopath cases. *See Humphrey v. Cady*, *supra*, 405 U.S. at 509-512 (substantial equal protection claim raised when jury trial is provided for civil commitment but not for sex psychopath proceeding).

[21] In most states, proof of dangerousness rests solely on a prediction of future behavior. *See* Beis, *State Involuntary Commitment Statutes*, 7 Mental Disability Law Reporter 358 (July-August, 1983). In a few states, there is also an "overt act" requirement. *See ibid.* But even in those states, the kind of act, attempt or threat that has been found sufficient for commitment typically is far broader than the kind of behavior that is required for a criminal conviction. *See* Stromberg, "Developments Concerning the Legal Criteria for Civil Commitment: Who Are We Looking For?" in *Psychiatry 1982: Annual Review* 343 (L. Grinspoon, ed., 1982).

Moreover, the actual deprivation of liberty imposed on a committed patient is considerably different from that faced by a sexually dangerous person. Virtually all civil commitment statutes require periodic reviews, where the state has to prove anew that the criteria for commitment are still being met. *See* Van Duizend, *et al.*, *An Overview of State Involuntary Civil Commitment Statutes*, 8 Mental Disability Law Reporter 328, 335 (May-June, 1984). Due to these procedures, as well as the fact that most civil committees suffer from mental illnesses that are usually amenable to traditional forms of treatment, *see* Gove & Fain, *A Comparison of Voluntary and Committed Psychiatric Patients*, 34 Arch. Gen. Psychiat. 669 (1977), the average period of hospitalization for civilly committed patients is less than a month.[22] This relatively short period of confinement contrasts sharply with the 2-year average period of confinement experienced by sex psychopaths. *See* p. 14 *supra*. Similarly, the facilities to which civil committees are sent typically allow patients considerable liberty within the hospital, and are invariably far less security-oriented and punitive than hospitals for the criminally insane. *See* pp. 14-15 *supra*.[23]

A meaningful comparison between civil commitment proceedings and sex psychopath proceedings, therefore,

---

[22] This figure is based on an unpublished study by the National Institute of Mental Health. According to the Institute, in 1980—the last year for which data are available—civilly committed patients averaged 25 days in state and county hospitals, 14 days in private psychiatric hospitals and 10 days in general hospitals.

[23] Although there is, unfortunately, still some stigma associated with involuntary hospitalization for treatment of a mental illness, this Court has previously pointed out that "[t]he pattern of untreated, abnormal behavior—even if nondangerous—arouses at least as much negative reaction as treatment that becomes public knowledge. A person needing, but not receiving appropriate medical care may well face even greater social ostracism resulting from the observable symptoms of an untreated disorder." *Parham v. J.R.*, 442 U.S. 584, 601 (1979).

leads to a different conclusion from the one reached by the court below. The plain fact is, as this Court has acknowledged, "[i]n a civil commitment, state power is *not* exercised in a punitive way." *Addington v. Texas*, 441 U.S. 418, 428 (1979) (emphasis added). For that basic reason, the Fifth Amendment privilege would then stand only as an impediment to the state's ability to effectuate its essentially benevolent goals. *Cf. Estelle v. Smith*, *supra*, 451 U.S. at 465 (privilege does not apply to compelled psychiatric examination for purpose of assessing competency to stand trial). The relevant considerations in sex psychopath proceedings point in the opposite direction.

C. The Court Below Mistakenly Relied On *Mathews v. Eldridge*, 424 U.S. 319 (1976), In Deciding Whether The Privilege Against Self-Incrimination Should Apply To A Sexually Dangerous Person Proceeding.

The Illinois Supreme Court also found support for its constitutional ruling by invoking the multi-factored due process analysis articulated in *Mathews v. Eldridge*, *supra*, 424 U.S. at 334. In particular, the court emphasized two aspects of the *Eldridge* test in rejecting the privilege: (1) "[t]he privilege against self-incrimination would add little more reliability to the proceedings"; and (2) the state's "substantial interest in treating as well as protecting the public from sexually dangerous persons . . . would be almost totally thwarted by a strict application of the self-incrimination privilege in such proceedings." Pet. App. 6-7. In our view, the court's reliance on *Eldridge* was misplaced and, in any event, its conclusion about the effect of the privilege on the state's legitimate interests is greatly exaggerated.

The *Eldridge* test was designed to determine whether a particular set of "administrative procedures . . . are constitutionally sufficient." 424 U.S. at 334. Such an inquiry, of course, is bottomed on the recognition that "[d]ue process is flexible and calls for such procedural

protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). That same flexibility, however, is not appropriate when determining the applicability of an express constitutional protection like the Fifth Amendment privilege. On the contrary, the privilege was specifically intended to protect interests that go beyond those identified in the *Eldridge* test. "[T]he privilege has a broader and deeper thrust than the rule which prevents the use of confessions which are the product of coercion because coercion is thought to carry with it the danger of unreliability. One of its purposes is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction." *In re Gault*, *supra*, 387 U.S. at 47 (citations omitted). *See also Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

In view of this acknowledged purpose, application of the privilege invariably makes it more difficult for the state to impose penal sanctions. *See Lefkowitz v. Cunningham*, 431 U.S. 801, 808 (1977) ("We have already rejected the notion that citizens may be forced to incriminate themselves because it serves a governmental need."). Thus, by looking to *Eldridge*, the Illinois court focussed on the wrong set of relevant interests. Indeed, if the *Eldridge* test were applied to a traditional criminal prosecution, the very same considerations relied on by the court below would lead to a ruling that abrogated the privilege in those circumstances as well.

Although the Illinois Supreme Court's reliance on *Eldridge* was mistaken, we nevertheless think it is appropriate to point out that the court significantly exaggerated the effect of applying the privilege on the state's legitimate interests under a sexually dangerous persons statute—*i.e.*, "treating as well as protecting the public from sexually dangerous persons." Pet. App. 7. Several meaningful options would remain available to the

state. If the defendant exercises his Fifth Amendment privilege, and the state believes that, as a result, it will be unable to prove all the elements of sexual dangerousness, it can still prosecute for the underlying criminal offense. Once the defendant has been properly convicted and sentenced, needed treatment can then be provided in prison or through a transfer to a treatment facility, such as the one in which Allen is being held. *See Vitek v. Jones*, 445 U.S. 480 (1980).

In addition, despite application of the privilege, there will still be many instances when it is possible to proceed under a sex psychopath statute. The defendant may, with appropriate safeguards, waive the privilege if he views such a disposition as preferable to a criminal prosecution, either because he seeks treatment or for other reasons.[24] And even if the defendant is not willing to waive the privilege, it may be possible to prove the requisite criteria through a combination of third-party testimony about the defendant's actions as well as his social and medical history, and predictive statistical and actuarial information. *Cf. Jurek v. Texas*, 428 U.S. 262, 272-73 (1976); *Barefoot v. Estelle*, 103 S. Ct. 3383, 3399-4000 (1983).[25]

In sum, to paraphrase this Court's statement when faced with a similar claim about the effect of applying the privilege (and other protections) to juvenile proceedings, such requirements "will not compel the States to abandon or displace any of the substantive benefits

---

[24] The experience under the California "Mentally Disordered Sex Offender" law, for example, indicated that sex psychopath dispositions had become fully integrated into the plea bargaining process because defendants believed that such a commitment would be of shorter duration than a felony sentence. *See* Guttman, *MDSO Law: The Assumption Challenged*, 4 Crim. Justice J. 75 (1980).

[25] It may also be appropriate to require that the defendant submit to a compelled psychiatric examination when he seeks to admit psychiatric testimony in an effort to rebut the state's proof in a sexually dangerous person proceeding. *See Estelle v. Smith, supra*, 451 U.S. at 465.

of the [sexually dangerous persons] process." *In re Gault*, *supra*, 387 U.S. at 21. Rather, the application of the privilege against self-incrimination in the circumstances presented here will simply mean that a defendant cannot be confined indefinitely in a prison-like setting on the basis of his own statements.[26]

CONCLUSION

For the foregoing reasons, the Court should rule that the Fifth Amendment privilege against self-incrimination applies to proceedings under the Illinois Sexually Dangerous Persons Act.

Respectfully submitted,

JOEL I. KLEIN
(Counsel of Record)
JOANN E. MACBETH
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184
Counsel for Amicus Curiae

---

[26] If the Fifth Amendment privilege applies to proceedings under the Illinois Sexually Dangerous Persons Act, it is clear that it was violated in this case. *See Estelle v. Smith*, *supra*, 451 U.S. at 466-69. There, the Court held that, when the privilege applies to a court-ordered psychiatric examination of a defendant who is in custody, the defendant must be advised that "he has a right to remain silent" and that "anything said can be used against the individual in court." 451 U.S. at 467, quoting *Miranda v. Arizona*, 384 U.S. 436, 467-69 (1966). We note also that the ethical standards of the psychiatric profession require an examining psychiatrist to give such warnings before conducting any examination to which the usual rules of confidentiality do not apply. *See* APA *Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry*, Section 3, Annotation 6 (1985). Apparently only one of the psychiatrists who examined Allen gave any warning at all. *See* November 12, 1982 report of Dr. Mortimer D. Beck to court. Even that warning was insufficient for constitutional purposes since it only advised the defendant that the results of the examination would be reported to the court.

MOTION FILED
JAN 10 1986

No. 85-5404

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

TERRY B. ALLEN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The
Illinois Supreme Court

MOTION FOR LEAVE TO FILE AND BRIEF FOR EDWIN F. MANDEL LEGAL AID CLINIC AS AMICUS CURIAE

RANDALL D. SCHMIDT
Counsel of Record
MARK J. HEYRMAN
EDWIN F. MANDEL LEGAL AID CLINIC
of the University of Chicago Law School
and United Charities of Chicago
6020 South University Avenue
Chicago, Illinois 60637
(312) 962-9611

Attorney for Amicus Curiae

No. 85-5404

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

TERRY B. ALLEN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent,

On Writ Of Certiorari To The Illinois Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

JANUARY 10, 1986

The Edwin F. Mandel Legal Aid Clinic of the University of Chicago Law School hereby respectfully moves for leave to file the attached brief as amicus curiae in this case. The consent of the attorney for the

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

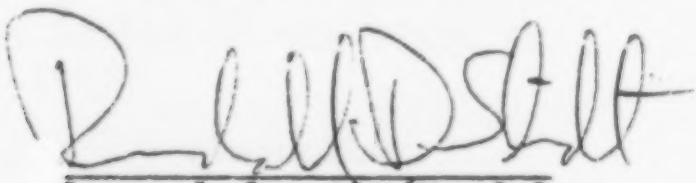
Petitioner has been obtained. The consent of the attorney for the Respondent was requested but refused.

The interest of the Mandel Legal Aid Clinic in this case arises from the fact that it has represented and will continue to represent persons confined under the Illinois Sexually Dangerous Persons Act, Ill. Rev. Stat., ch. 38, § 105-1.01, et seq., which is the subject of this case. Specifically, the Mandel Legal Aid Clinic represented the plaintiff in Stachulak v. Coughlin, 520 F.2d 931 (7th Cir. 1975), and a class, consisting of all person in custody under the Illinois Sexually Dangerous Persons Act, in Morgan v. Sielaff, 540 F.2d 268 (7th Cir. 1977), both of which may be overruled by an adverse decision of this Court.

In the instant case neither party has thus far argued what standard(s) should be used to determine

whether a case is criminal for purposes of the Fifth Amendment privilege against self-incrimination. In the attached brief the Mandel Clinic will argue that this Court has established such a standard and will apply it to the facts of this case. If this argument is accepted, it would dispose of this case.

Respectfully submitted,



Counsel for the Mandel
Legal Aid Clinic

Date: January 10, 1986

No. 85-5404

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

TERRY B. ALLEN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The
Illinois Supreme Court

BRIEF FOR EDWIN F. MANDEL LEGAL AID CLINIC AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER, TERRY B. ALLEN

TABLE OF CONTENTS

Page

Table of Authorities.....iii

Statement of Interest.....iv

Summary of Argument.....1

ARGUMENT.....3

I. THE PRIVILEGE AGAINST SELF-INCRIMINATION APPLIES IN ILLINOIS SEXUALLY DANGEROUS PERSONS PROCEEDINGS UNDER THE FOUR-PART GAULT TEST.....3

A. The Four Factors Considered By This Court in Gault Were: (1) The Maximum Length of Confinement; (2) The Nature of Confinement; (3) The Stigmatizing Effect of the Classification; and, (4) The Nature of the Adjudicatory Process.....5

B. SDP Proceedings Are Criminal Cases Under the Gault Test.....12

Page

CONCLUSION.....20

APPENDICES

Sex Offenders' Treatment Program.....Appendix A

Photograph of Menard Psychiatric Center Cell Block.....Appendix B

Affidavit of Mark J. Heyrman.....Appendix C

TABLE OF AUTHORITIES

Case	Page
Addington v. Texas, 441 U.S. 418 (1979)	9
In Re Gault, 387 U.S. 1 (1967)	passim
In Re Winship, 397 U.S. 358 (1970)	9
Middendorf v. Henry, 425 U.S. 25 (1976)	5
People v. Allen, 107 Il1.2d 91 (1985)	3,4,17
Schall v. Martin, ___ U.S. ___, 104 S.Ct. 2403 (1984)	8
United States v. Regan, 232 U.S. 37 (1914)	5
United States v. Ward, 448 U.S. 242 (1979)	5,10
United States ex Rel. Stachulak v. Coughlin, 520 F.2d 931 (7th Cir. 1975)	12.13,14,16 17,18

Case Page

Statutes:

Ill. Rev. Stat., 1983, ch. 38 § 105-1.01 to 105-12.....passim

Ill. Rev. Stat., 1983, ch. 38, § 104-17.....15

Ill. Rev. Stat., 1983, ch. 38, § 1005-2-4(a).....15

Ill. Rev. Stat., 1983, ch. 91 1/2, § 1-100 et seq....15

With the written consent of the Petitioner and upon motion for leave to file brief as Amicus Curiae, the Mandel Legal Aid Clinic submits this brief as Amicus Curiae in support of Petitioner, Terry B. Allen.

STATEMENT OF INTEREST

The Edwin F. Mandel Legal Aid Clinic of the University of Chicago Law School, in existence since 1959, is dedicated to protecting against and remedying deprivations of constitutionally protected rights. The Clinic regularly represents persons who have been found sexually dangerous under the Illinois Sexually Dangerous

Persons Act, and other mentally ill persons confined in prisons and mental hospitals under Illinois law. Denial of the privilege against self-incrimination in proceedings under the Illinois Sexually Dangerous Persons Act would seriously affect the rights of all classes of mentally ill persons confined in Illinois.

SUMMARY OF ARGUMENT

Persons accused of being sexually dangerous under the Illinois Sexually Dangerous Persons (hereinafter, "SDP") Act are entitled to the Fifth Amendment privilege against self-incrimination. The Fifth Amendment privilege against self-incrimination applies to any criminal case. In In Re Gault, 387 U.S. 1 (1967), this Court adopted a four-part test to determine whether a proceeding is a criminal case within the meaning of the Fifth Amendment. The four factors adopted in Gault include: (1) the maximum length of confinement; (2) the nature of confinement; (3) the stigmatizing effect of the classification; and (4) the nature of the adjudicatory process. This Court applied this test in Gault and held that delinquency proceedings were criminal cases within the meaning of the Fifth Amendment.

Persons determined to be sexually dangerous under the SDP Act are confined indefinitely in a maximum security state penitentiary and are severely stigmatized. Moreover, the adjudicatory proceedings are criminal in nature since they require the finder of fact to determine that the defendant has committed a criminal act, and since they provide such typically criminal procedures as the right to jury trial, the right to appointed counsel and the requirement of proof beyond a reasonable doubt. Therefore, under the four-part Gault test, this Court should hold that persons alleged to be sexually dangerous are entitled to the protection of the Fifth Amendment privilege against self-incrimination.

ARGUMENT

I. THE PRIVILEGE AGAINST SELF-INCRIMINATION APPLIES IN ILLINOIS SEXUALLY DANGEROUS PERSONS PROCEEDINGS UNDER THE FOUR-PART GAULT TEST.

One of the questions presented for review in this case is whether the Fifth Amendment privilege against self-incrimination applies to proceedings under the Illinois SDP Act. Ill. Rev. Stat., 1983, ch. 38, § 105-1.01 et seq. The Fifth Amendment expressly states that the privilege against self-incrimination applies to "any criminal case." The Illinois Supreme Court, however, held that the privilege does not apply to SDP proceedings because such proceedings are not criminal cases within the meaning of the Fifth Amendment. People v. Allen, 107 Ill.2d 91, 99-101 (1985). Under that holding, persons accused of being sexually dangerous may be compelled to provide

testimony that will be used to determine whether they can be confined indefinitely in a maximum security state penitentiary. People v. Allen, 107 Ill.2d at 103-104.

In In Re Gault, 387 U.S. 1 (1967), this Court adopted a four-part test in order to determine whether delinquency proceedings were criminal cases within the meaning of the Fifth Amendment privilege against self-incrimination. Application of the test adopted in Gault, will demonstrate that proceedings under the SDP Act are also criminal cases within the meaning of the Fifth Amendment. Thus, this Court should hold that the Fifth Amendment privilege against self-incrimination applies to SDP proceedings and that persons accused of being sexually dangerous cannot be compelled to provide testimony that will be used to determine whether they are SDPs.

A. The Four Factors Considered By This Court in Gault Were: (1) The Maximum Length of Confinement; (2) The Nature of Confinement; (3) The Stigmatizing Effect of the Classification; and, (4) The Nature of the Adjudicatory Process.

In Gault, this Court identified a four-part test in order to determine whether delinquency proceedings resulting in loss of liberty were criminal cases within the meaning of the Fifth Amendment.[1/] The four factors the Court identified were: (1) the maximum length of confinement; (2) the nature of confinement; (3) the stigmatizing

---

[1/] This Court has used other tests when liberty is not at stake, United States v. Ward, 448 U.S. 242, 251-254 (1980), and when constitutional guarantees other than the privilege against self-incrimination are involved. Middendorf v. Henry, 425 U.S. 25, 33-42 (1976). However, this Court has consistently held that the meaning of "criminal case" under the Fifth Amendment is broader than similar usages in other constitutional provisions. Ward, 448 U.S. at 253; United States v. Regan, 232 U.S. 37, 50 (1914).

effect of the classification; and (4) the nature of the adjudicatory process. Gault, 387 U.S. at 12-59. In the Gault case itself, this Court applied the four-part test and held that: "[j]uvenile proceedings to determine 'delinquency,' which may lead to commitment to a state institution, must be regarded as 'criminal' for purposes of the privilege against self-incrimination." 307 U.S. at 49.

Under the first Gault factor, maximum length of confinement, this Court determined that the delinquency proceedings in Gault were criminal in nature because a juvenile could be confined "for a maximum of six years." Gault, 307 U.S. at 29. An adult committing the same offense could not be held for more than two months. Thus, the criminal nature of the proceeding was magnified by the disparity in the possible

length of confinement. Gault, 307 U.S. at 24.

Under the second factor, nature of confinement, this Court determined that even though juveniles were sent to industrial schools, instead of prisons, such a distinction was of "no constitutional consequence" since industrial schools are "institutions of confinement in which the child is incarcerated for a greater or lesser time." Gault, 387 U.S. at 27. Moreover, this Court determined that delinquency proceedings were criminal in nature because there was no assurance that a juvenile would "be kept in separate institutions apart from adult 'criminals'" or that he "would remain outside of the reach of the adult courts as a consequence of the offense for which he [was] taken into custody." Gault, 387 U.S. at 51.

The first two factors of the Gault test were also applied in Schall v. Martin, ___ U.S. ___, 104 S.Ct. 2403 (1984), to determine whether pretrial detention of an accused delinquent was punishment under the due process clause of the Fourteenth Amendment. In Schall, this Court determined that such detention was not punishment because (1) the maximum length of a pretrial detainee's confinement, 17 days, was short and (2) the nature of the confinement was not punitive since the detainees were placed in a halfway house without locks or bars, rather than a prison or lockup holding adult criminals. 104 S.Ct. at 2413.

Under the third factor, the stigmatizing effect of the classification, this Court determined, in Gault, that delinquency proceedings were criminal in nature because the

term "delinquent" involved "only slightly less stigma than the term 'criminal' applied to adults." Gault, 387 U.S. at 24.

This Court has applied the first three Gault test factors in two other cases. In In Re Winship, 397 U.S. 358 (1970), this Court determined that the state must establish that a child is a delinquent by proof beyond a reasonable doubt under the due process clause of the Fourteenth Amendment because a "proceeding where the issue is whether the child will be found to be 'delinquent'and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution." 397 U.S. at 367. The first three Gault factors were also applied by this Court in Addington v. Texas, 441 U.S. 418, 427-431 (1979), to determine whether a state must establish that a person is mentally ill and dangerous by

proof beyond a reasonable doubt in routine civil commitment proceedings.

Finally, under the fourth factor, the nature of the adjudicatory process, this court determined, in Gault, that delinquency proceedings were criminal in nature because a child had to commit an act violating state law in order to be found delinquent. Gault, 387 U.S. at 8. Thus, this Court determined that a finding of deliquency is little different from a conviction under a penal statute. 387 U.S. at 28-29.

This factor was also applied by this Court in United States v. Ward, 475 U.S. 242 (1980). In Ward, the Court determined that a statute assessing a financial penalty was not a criminal case within the meaning of the privilege against self-incrimination clause of the Fifth Amendment.

This Court did, however, state that respondent's claim to the contrary was aided by the fact that "the behavior to which the penalty applies is already a crime." 425 U.S. at 249-50.

In Gault, this Court also relied upon the fact that the nature of the delinquency proceeding was adversarial since neither the juvenile court judge nor the probation officer could be an advocate for the child while at the same time testifying against him or deciding whether to send him to a state institution. 387 U.S. at 36. Thus, based on the four factors mentioned above, this court, in Gault, held that delinquency proceedings were criminal cases within the meaning of the Fifth Amendment.

B. SDP Proceedings Are Criminal Cases Under the Gault Test.

A person must be charged with and found to have committed a criminal offense in order to be found sexually dangerous. A person found sexually dangerous is then indefinitely incarcerated in a cell in the psychiatric division of a maximum security penitentiary. Therefore, SDP proceedings must be regarded as criminal cases within the meaning of the Fifth Amendment under the Gault test.

The first factor of the Gault test is the maximum length of confinement. In United States ex rel. Stachulak v. Coughlin, 520 F.2d 931, 937 (7th Cir. 1975), the Seventh Circuit Court of Appeals relied on this factor to determine that the "reasonable-doubt standard of proof" should apply

in SDP proceedings. Thus, the Seventh Circuit held that:

> [T]he loss of liberty is as great [in a SDP proceeding], if not greater, than the loss in Winship [and Gault]. The violator of the criminal law -- be he an adult or juvenile -- is imprisoned, if at all, in almost all cases for a definite term. The person found to be sexually dangerous is committed for an indeterminate period ... .

Stachulak, 520 F.2d at 935-936. The criminal nature of an SDP proceeding is magnified by the fact that an SDP can be held far longer than a person convicted of committing the same unlawful act. Stachulak, 520 F.2d at 936 n.4. Maximum length of confinement under the SDP Act is also much longer than the 17 day period that this Court considered non-punitive in Schall.

Under the second factor of the Gault test, the nature of confinement, SDP proceedings are also more criminal than delinquency proceedings. For

instance, delinquents are committed to industrial schools or receiving homes, Gault, 387 U.S. at 27, while Petitioner and other SDPs are committed to the custody of the Illinois Director of Corrections and confined at "the Psychiatric Division of the Illinois State Penetentiary at Menard, a maximum-security penal institution." Stachulak, 520 F.2d at 932-33, 936 n.4. In addition to SDPs, the Psychiatric Division at Menard houses inmates who were convicted of sexual offenses and other mentally ill prisoners. SDPs are provided the same treatment services as convicted sex offenders and are accorded the same services, privileges and rights as "other inmates incarcerated at [the Menard] facility." Appendix A-1 to A-3. All of the residents of the Psychiatric Division are housed in single occupancy, maximum security cells. Appendix C-2 (A

photo of the cells is provided in Appendix B. Appendix B-1). Thus, the conditions of confinement under the SDP Act are much more criminal than in Gault or Schall where none of the juveniles were placed in cells or housed with persons convicted of offenses.

Additionally, SDPs are committed to the custody of the Director of the Department of Corrections. Ill. Rev. Stat., 1983, ch. 38, § 105-8. All other persons who the state claims they are confining for treatment are placed in the custody of the Director of the Department of Mental Health. See e.g., Ill. Rev. Stat., 1983, ch. 38, § 1005-2-4(a) (committed insanity acquittees); Ill. Rev. Stat., 1983, ch. 38, § 104-17(b) (persons committed because they are unfit to stand trial); Ill. Rev. Stat., 1983, ch. 91 1/2, §§ 1-100 et seq. (all other civil patients).

On the other hand, the Department of Corrections has custody only over those convicted of crimes, juveniles found delinquent under the Juvenile Court Code and SDPs. Thus, SDPs are treated like criminals, not like civil patients who are confined for treatment.

The third Gault factor, stigma, was also relied on by the Seventh Circuit Court of Appeals in Stachulak. In Stachulak the Seventh Circuit held that with respect to stigma, SDP proceedings represent an "a fortiori case." 570 F.2d at 936. The effect of the label 'SDP' is more stigmatizing than the label 'delinquent' because a finding of sexual dangerousness not only signifies that Petitioner committed a criminal act, but is also "more damning than a finding of juvenile delinquency." Stachulak, 520 F.2d at 936. Moreover, unlike

delinquency proceedings, SDP proceedings are not confidential. Stachulak, 520 F.2d at 936.

Finally, the fourth Gault factor, the nature of the adjudicatory process, also demonstrates that SDP proceedings like delinquency proceedings, are criminal. That is because, under Allen, 107 Ill.2d at 105, a person cannot be found sexually dangerous unless he has committed one act of or attempt at sexual assault or sexual molestation, both of which are crimes under Illinois law. Ill. Rev. Stat., 1983, ch. 38, § 11-1 et seq. Likewise, in juvenile delinquency proceedings, a child cannot be found delinquent, unless he has committed a criminal act. Ill. Rev. Stat., 1983, ch. 37, § 702-2.

In addition, a person cannot be found sexually dangerous unless actually charged with a criminal

offense. Ill. Rev. Stat., 1983, ch. 38, § 105-3. Thus, the punitive powers of the state are implicated in that the act triggering confinement violates penal law and actual criminal charges are brought. In Stachulak, the Seventh Circuit stated that since the SDP Act is an alternative to criminal prosecution, it is also in a very real sense a penal measure. 520 F.2d at 936 n.5.

The process in a sexually dangerous person proceeding is also more criminal in nature than a delinquency proceeding. For example, a petition accusing a person of being sexually dangerous must be filed in the same proceeding where the person stands charged with the criminal offense. Ill. Rev. Stat., 1983, ch. 38, § 105-3. In contrast, delinquency proceedings are separate from proceedings where criminal charges may be

brought. However, under the SDP Act, the same judge that would hear the criminal charge determines whether the accused is sexually dangerous. The SDP Act and the laws governing criminal trials are also both part of the Illinois Code of Criminal Procedure. Delinquency proceedings, which are part of the Juvenile Court Code, are not. SDP procedures are also criminal cases under the Fifth Amendment because they are adversarial in nature.

SDPs have the statutory right to counsel, trial by jury, and a reasonable-doubt standard of proof. Ill. Rev. Stat., 1983, ch. 38, § 105-301. Thus, SDP proceedings are criminal cases under the Gault test, and the privilege against self-incrimination should apply.

III. Conclusion

For the reasons mentioned above, this Court should reverse that part of the Illinois Supreme Court's decision holding that a person accused of being a SDP cannot refuse to answers questions even though his answer will be used to demonstrate that he is a SDP. This brief offers no opinion on whether psychiatists must give Miranda warnings before examining SDPs or whether Petitioner waived his privilege in this case.

Respectfully submitted,

Randall D. Schmidt

RANDALL D. SCHMIDT
Counsel of Record
MARK J. HEYRMAN
EDWIN F. MANDEL LEGAL AID CLINIC
of the University of Chicago Law School
and United Charities of Chicago
6020 South University Avenue
Chicago, Illinois 60637
(312) 962-9611

No. 85-5404

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

TERRY B. ALLEN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The
Illinois Supreme Court

APPENDICES TO BRIEF OF EDWIN F. MANDEL LEGAL AID CLINIC AS AMICUS CURIAE

APPENDIX A

SEX OFFENDERS' TREATMENT PROGRAM

A formalized treatment program at Menard Psychiatric Center for sex offenders was initiated early in 1971 in response to the need for such an activity for those inmates committed to the Department of Corrections under the Sexually Dangerous Person's Act. This treatment program was later expanded to include inmates who either were convicted of a sexual offense or had a documented history of sexually offending and wished to volunteer to participate in a sex offender treatment program.

For technical purposes, given the unique legal situation of the Sexually Dangerous Person (SDP), the sex offender treatment program has been divided into two groups, SDPs and Volunteer Sex Offenders (VSOs). However, for treatment pur-

poses, both groups are provided the same services composed of a combination of Milieu Therapy, Time-Limited Supportive Individual Therapy, Family Therapy where possible and appropriate, Group Therapy, Didactic Therapeutic Experiences, and other relevant therapeutic activities. Such activities may include Educational and Vocational programming and Leisure Time Therapy depending upon the needs of the inmate.

The direction and supervision of all treatment services for SDPs and VSOs rests primarily in the hands of assigned Clinical Services staff in conjunction with staff psychiatrist(s) who together form the core of two treatment teams, one each for SDPs and VSOs. Other staff members from Menard Psychiatric Center are assigned to one or both of these two treatment teams on an as needed basis for the purpose of assisting in evaluating,

planning, and implementing treatment activities.

All participants in the Menard Psychiatric Center Sex Offender Treatment Program are accorded the same services, privileges, and rights as any other inmate who is incarcerated at this facility. The primary differences between participants in the Sex Offender Treatment Program and other inmates at Menard Psychiatric Center are that by Departmental policy, all SDPs are incarcerated at Menard Psychiatric Center, and by Institutional policy, the committing court, State's Attorney, and the lawyer of all SDPs receive regular evaluative reports, SDPs may only be released by their committing court, and VSOs are permitted to engage in the program contigent upon their demonstrating suitability as a candidate for treatment and progress in treatment.

In addition, all participants in the Sex Offender Treatment Program are fully informed as to the risks of therapy, the limits of confidentiality in a correctional psychiatric center (including the legal mandate for Menard Psychiatric Center to report known or suspected incidents of abuse or neglect to the Illinois Department of Children and Family Services), management of clinical records per Administrative and Institutional Directives, and in the case of VSOs, the requirement that they engage in psychological testing and clinical assessments and observations in order to be both considered for and maintained in the Sex Offender Treatment Program.

As is their legal right, SDPs may refuse treatment, and both VSOs

and SDPs may choose at any time to voluntarily stop participating in the Sex Offender Treatment Program.

APPENDIX B

APPENDIX C

STATE OF ILLINOIS)
)SS
COUNTY OF COOK)

AFFIDAVIT

Mark Heyrman, being first duly sworn on oath, states as follows:

1. that he is an attorney employed by the Mandel Legal Aid Clinic of the University of Chicago Law School;

2. that on December 17, 1983 he made a request to obtain certain documents from the Illinois Department of Corrections (DOC) pursuant to the Illinois Freedom of Information Act;

3. that in response to a request for documents describing the DOC programs for persons committed under the Illinois Sexually Dangerous Persons Act, on January 10, 1986 he received from DOC the document attached as Appendix A;

4. that in response to a request for photographs of the Menard Psychiatric Center, he received from DOC the photograph attached as Appendix B;

5. that he has personally visited Menard Psychiatric Center on several occasions;

6. that Appendix B accurately reflects the fact that all of the inmates at the Menard Psychiatric Center are housed in ordinary prison cells, such as those typically provided for persons convicted of crimes in Illinois and other states.

Mark Heyrman

Subscribed and Sworn
to before me this 10th
day of January, 1986.

Notary Public

MOTION FILED
JAN 10 1986

(8)

No. 85-5404

IN THE

Supreme Court of the United States

October Term, 1985

TERRY B. ALLEN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

Motion for Leave to File and Brief for The Mental Health Information Service, Second Judicial Department as *Amicus Curiae* in Support of Petitioner

FRANCIS M. SAVASTANO, Director
ROBERT A. FEENICK, Principal Attorney
WILLIAM M. BROOKS,* Attorney

Mental Health Information Service
Second Judicial Department
Harlem Valley Psychiatric Center
Building R
Wingdale, NY 12594
(914) 832-6514

*Counsel of Record

3 pp

No. 85-5404

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

TERRY B. ALLEN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Motion for Leave to File an *Amicus Curiae* Brief.

The Mental Health Information Service, Second Judicial Department, (Service) respectfully moves this Court for leave to file the attached brief *amicus curiae* in this proceeding. The attorney for petitioner has consented to such filing. The Attorney General for the State of Illinois, the attorney for respondent, has not consented.

The Service is an advocacy organization that is authorized pursuant to NYMHL §29.09 and 22 NYCRR Part 694 to provide legal services to institutionalized individuals in connection with care and treatment issues. Much of the work of the Service relates to the representation of in-

voluntarily confined patients at civil commitment hearings and the litigating of issues pertaining to civil commitment.

In refusing to provide consent to the Service, Mark Rotert, Assistant Attorney General, gave three reasons for such refusal. None however, contain sufficient justification. He stated that the Office of the Attorney General consented to the filing of an *amicus curiae* brief on behalf of the American Psychiatric Association. He further added that he could not answer contentions filed by many statewide advocacy organizations and was confident that petitioner's attorney could adequately address all issues on behalf of petitioner.

I have spoken with Peter A. Carusona of the Office of the State Appellate Defender, the attorney for petitioner and based upon such conversation, I believe the Service has taken a legal position different than either the American Psychiatric or either party to this proceeding. Indeed, Mr. Carusona has stated the Service has taken a perspective different than any other *amici* in this case. Because of the importance of this action, *amicus* respectfully submits that this Court should have as many views as possible when deciding the matter at hand.

The Service seeks leave to file an *amicus curiae* brief in order to present this Court with its legal position on a central issue in this proceeding, namely: Whether the privilege against self-incrimination attaches at the adjudicatory stage in a civil commitment proceeding? This issue is of particular importance to the Service because it is presently litigating the issue in *Ughetto et al. v. Acrish & Shah*, ____ Misc. 2d ____, 494 N.Y.S. 2d 943 (Sup. Ct., Dutchess Co. 1985), and this Court's determination of the question at hand will dispose of this issue within the lawsuit.

For the reasons given, the Service respectfully requests that this Court grant it leave to file the attached brief *amicus curiae*.

Respectfully submitted,

FRANCIS M. SAVASTANO
Director
Mental Health Information Service

BY: William M Brooks

WILLIAM M. BROOKS
Mental Health Information Service
Attorney

No. 85-5404

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

TERRY B. ALLEN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

Brief for the Mental Health Information Service, Second Judicial Department as *Amicus Curiae.*

Table of Contents

Page

Statement of Interest of *Amicus Curiae* 1

Summary of Argument 1

ARGUMENT:

The privilege against self-incrimination attaches at the adjudicatory state of a civil commitment proceeding 2

A. Just What Due Process Mandates in a Particular Situation Requires This Court to Examine the Purpose of the Procedural Protection in Question and Its Affect Upon the Proceeding in Question 4

B. A Loss of Physical Liberty Requires Greater Procedural Protection Than Any Other Constitutionally Protected Interest 6

C. The Consequences Flowing From a Finding of Hospitalization Under a State's Civil Commitment Law are Nearly as Severe as the Consequences of a Criminal Conviction..... 7

D. Application of the Above Propositions Establish that Under the Due Process Clause of the Fourteenth Amendment the Privilege Against Self-Incrimination Attaches at the Adjudicatory Stage of a Civil Commitment Proceeding 9

Conclusion 20

TABLE OF AUTHORITIES

CASES:

Page

Addington v. Texas, 441 U.S. 418 (1979) 2, 3, 4, 5, 7, 8, 9, 12, 14, 15

Barefoot v. Estelle, 463 U.S. 880 (1983) 14

Barkley v. United States, 323 F. 2d 804 (D.C. Cir. 1963) 14

Duncan v. Louisana, 391 U.S. 145 (1968) 2, 4, 7

Estelle v. Smith, 451 U.S. 454 (1983) 11

French v. Blackburn, 428 F. Supp. 1351 (M.D. N.C. 1977) 17

Gagnon v. Scarpelli, 411 U.S. 778 (1973)..... 3, 5, 6, 7

Goldberg v. Kelly, 397 U.S. 254 (1970)..... 2, 6

Haber v. People, 398 N.E. 2d 121 (Ill. App. 1979) .. 14

Hatcher v. Wachtel, 269 S.E. 2d 849 (W. Va. 1980) . 14

Humphrey v. Cady, 405 U.S. 504 (1972) 2

In re Gault, 387 U.S. 1 (1967) 2, 4, 6, 10, 11, 16, 17, 19

In re K.K.B., 609 P. 2d 747 (Okl. 1980) 15

In re Winship, 397 U.S. 358 (1970) 2, 4, 7

Page

Jones v. United States, 463 U.S. 354 (1983) 10

Jurek v. Texas, 428 U.S. 262 (1976) 14

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) 16

Lassiter v. Department of Social Services, 452 U.S. 18 (1981) 3, 4, 6, 8

Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wisc. 1972), vacated on other grounds 414 U.S. 473 (1974), reinstated and enforced 379 F. Supp. 1376 (E.D. Wisc. 1974), vacated on other grounds 421 U.S. 957 (1975) reinstated 413 F. Supp. 1318 (E.D. Wisc. 1976) 19

Lockett v. Ohio, 438 U.S. 586 (1976) 5

Malloy v. Hogan, 378 U.S. 1 (1964) 2

Mathews v. Eldridge, 424 U.S. 319 (1976) 3, 5, 9

Matter of Rizer, 409 N.E. 2d 383 (Ill. App. 1980) ... 15

McKeiver v. Pennsylvania, 403 U.S. 528 (1971) 3, 4, 5, 7, 8, 15, 16

Mills v. Rogers, 457 U.S. 291 (1982) 15

Mims v. United States, 375 F. 2d 135 (5th Cir. 1967) 14

Minnesota v. Murphy, ____ U.S. ____, 104 S. Ct. 1136 (1984) 3, 7

Page

Morrissey v. Brewer, 408 U.S. 471 (1972) 2, 3, 5, 6, 8, 10

Moss v. State, 539 S.W. 2d 936 (Tex. Civ. App. 1976) 17

Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964) 4, 9, 10, 19

O'Connor v. Donaldson, 422 U.S. 563 (1975) 10

People v. Allen, 481 N.E. 2d 690 (1985) 13

People v. Williams, 288 N.E. 2d 636 (Ill. App. 1972) 10

Pointer v. Texas, 380 U.S. 400 (1965) 5

Project Release v. Prevost, 722 F. 2d 960 (2nd Cir. 1983) 15

Project Release v. Prevost, 551 F. Supp. 1298 (E.D. N.Y. 1982) 17

Rennie v. Klein, 720 F. 2d 266 (3rd Cir. 1983) 15

Robinson v. California, 370 U.S. 660 (1962) 16

Santosky v. Kramer, 455 U.S. 745 (1982) 13

Scott v. Illinois, 440 U.S. 367 (1979) 6

Specht v. Patterson, 386 U.S. 605 (1967) 7

State v. Krol, 344 A. 2d 289 (N.J. 1975) 14

Page

Suzuki v. Quisenberry, 411 F. Supp. 113 (D.Haw. 1976) 19

Tehan v. United States ex rel. Shott, 382 U.S. 406 (1966) 9

Tippett v. Maryland, 436 F. 2d 1153 (4th Cir. 1971), cert. dismissed *sub nom.* Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972) ... 17

Ughetto et al. v. Acrish & Shah, ____ Misc. 2d ____, 494 N.Y.S. 2d 943 (Sup. Ct., Dutchess Co. 1985) 1

Ullman v. United States, 350 U.S. 422 (1956) 19

Vitek v. Jones, 445 U.S. 480 (1980) 14

Woodby v. Immigration and Naturalization Service, 385 U.S. 276 (1966) 8

Woodson v. North Carolina, 428 U.S. 280 (1976) ... 5

STATUTES:

Alaska Stat. §§47.30.725, 47.30.740 ..... 12, 15

Ariz. Rev. Stat. §§36-535, 36-537, 36-528 12

Ark. Stat. Ann. §§59-1402, 59-1408 ..... 12, 15

Cal. Welfare and Institutions Code §5276, (West) .. 12

Colo. Rev. Stat. §27-10-111, 27-10-107(5) 12

Page

Conn. Gen. Stat. Ann. §17-177, 17-178 12

Del. Code Health & Safety tit. 16 §5007-5008 12

Fla. Stat. Ann. §394.467 12

Ga. Code Ann. §37-3-61, 37-3-62 12

Haw. Rev. Stat. §§334-60.5 334-60.4 12

Idaho Code §§66-328, 66-329 12

Ill. Ann. Stat. ch. 38 §1-2 (Smith-Hurd) 10

Ill. Ann. Stat. ch 91 ½ §3-208 15

Ill. Ann. Stat. ch 91 ½ §§3-800, 3-805 12

Ind. Code Ann. §16-14-9.1-5 *et seq.* (Burns) 12

Iowa Code Ann. 229.7 *et seq.* (West) 12

Kan. Stat. §59-2913 *et seq.* 12

Ky. Rev. Stat. §§202A.051, 202A.071, 202A.121 ... 12

La. Rev. Stat. §§28:55, 28:53 (West) 12

Me. Rev. Stat. Public Institutions & Correctons tit. 34-B-§3864 12

Mass. Gen. Laws. Ann. ch 123 §1 *et seq.* (West) 12

Mich. Comp. Laws Ann. §339.1452 *et seq.* 12

Page

Minn. Stat. Ann. §§253B.08, 253B.03(a) (West) 12

Minn. Stat. Ann. §609.01(1) 10

Miss. Code Ann. §§41-21-73, 41-21-67 ..... 12, 15

Mo. Ann. Stat. §632.335 ..... 12, 15

Mont. Code Ann. §53-21-121 *et seq.* 12

Neb. Rev. Stat. §§83-1133, 83-1135 12

Nev. Rev. Stat. §§433A.220, 433A.270 12

N.H. Rev. Stat. Ann. §§135-B:3, 135-B:5 12

N.J. Stat. Ann. §2C 1-2(2) (West) 10

N.J. Stat. Ann. §30:4-42 12

N.M. Stat. Ann. §43-1-11, 43-1-4 12

N.Y. Judiciary Law §35 (McKinney) 12

N.Y. Mental Hygiene Law §§9.31, *et seq.*, 29.09 (McKinney) 12

N.Y. Penal Law §1.05(5) (McKinney) 10

N.C. Gen. Stat. §§122C-268, 122C-270 12

N.D. Cent. Code §§25-03.1-19 25-03.1-13 12

Ohio Rev. Code Ann. §5122.15 (Page) 12

Page

Okla. Stat. Ann. Mental Health Law §54.4 12

Or. Rev. Stat. §§426.060 *et seq.*, 426.100 12

Pa. Stat. Ann. tit. 50 §7301 *et seq.* (Purdon) 12

R.I. Gen. Laws §§40.1-5-8, 40-1-5-13 *et seq.* 13

S.C. Code §§44-17-510 *et seq.*, 44-17-530 13

Tenn. Code Ann. §§33-3-603, 33-3-608 13

Tex. Mental Health Law Code Ann. tit 92 §5547-26 *et seq.* 13

Tex. Penal Code Ann. tit. 1 §1.02(1)(b) 33-3-608 ... 10

Utah Code Ann. §64-7-36 13

Vt. Stat. Ann. tit. 18 §§7612, 7615, 7613 13

Va. Code §§37.1-67.1, 37.1-67.3 13

Wash. Rev. Code §§71.05.310, 71.05.2300 13

W. Va. Code §27-5-4 13

Wis. Stat. Ann. §51.20 (West) 13

Wyo. Stat. §25-10-110 13

CONSTITUTIONAL PROVISIONS:

United States Constitution Amendment V 11

Page

United States Constitution Amendment XIV 8, 9

ADMINISTRATIVE PROVISIONS:

N.J. Ct. R. 4:74-7(e) 12

22 NYCRR Part 694 12

OTHER AUTHORITIES:

Ennis & Litwack, Psychiatry and The Presumption of Expertise: Flipping Coins in the Courtroom, 62 Calif. L. Rev. 693 (1974) 12

McCormick, Evidence (2nd Ed. 1954) 14

Monahan & Wexler, A Definite Maybe: Proof and Probability in Civil Commitment, 2 L. & Human Behav. 37 (1978) 10

Note, Developments in the Law: Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190 (1974) 16

Note, Miranda on the Couch: An Approach to Problems of Self-Incrimination, Right to Counsel and Miranda Warnings in Pre-Trial Psychiatric Examinations of Criminal Defendants, 11 Columbia J. L. & Soc. Prob. 403 (1975) 11

VIII Wigmore, Evidence (McNaughton Rev. 1961) 18, 19

Statement of Interest.

The Mental Health Information Service, Second Judicial Department represents institutionalized patients confined in New York's Second Judicial Department in matters relating to care and treatment. Hence a substantial portion of this organization's work involves representing patients at commitment hearings and litigating issues that pertain to civil commitment. This case particularly concerns the Mental Health Information Service because a number of psychiatric centers within the Second Judicial Department compel patients to undergo psychiatric examinations, conducted by non-treating psychiatrists, for the express purpose of eliciting information that the hospital can use at the patient's commitment hearing. The Mental Health Information Service has instituted litigation to determine whether or not a patient can assert the privilege against self-incrimination to refuse to submit to such an examination. *Ughetto et al. v. Acrish & Shah,* ____ Misc. 2d ____, 494 N.Y.S. 2d 943 (Sup. Ct., Dutchess Co. 1985). A decision by this Court as to whether or not the privilege against self-incrimination attaches at the adjudicatory stage of a civil commitment hearing will dispose of the issue raised in *Ughetto* and will directly affect the clientele of the Mental Health Information Service.

Summary of Argument.

When determining whether or not the privilege against self-incrimination attaches at the adjudicatory stage of a civil commitment proceeding, this court must apply a standard of "fundamental fairness." Just what constitutes "fundamental fairness" entails evaluating a number of factors: How a compelled psychiatric examination at the adjudicatory stage of a civil commitment hear-

ing implicates the values underlying the privilege against self-incrimination; the loss of liberty that an individual suffers from commitment; and, the degree to which imposition of the privilege will impact upon a commitment hearing. A compelled psychiatric examination at the adjudicatory stage alters the state-individual balance, converts our system of justice from an accusatory to an inquisitorial system and invades the "private enclave" of the subject. Furthermore, a civil committee suffers from both a loss of liberty and the imposition of stigma as a result of commitment, and application of the privilege at the adjudicatory stage will not impact adversely upon the state's interest in committing dangerous mentally ill individuals. As such, the privilege against self-incrimination attaches at the adjudicatory stage of a civil commitment proceeding.

ARGUMENT.

The privilege against self-incrimination attaches at the adjudicatory stage of a civil commitment proceeding.

Civil commitment entails a "massive curtailment of liberty," *Humphrey v. Cady,* 405 U.S. 504, 509 (1972), that requires due process protection. *Addington v. Texas,* 441 U.S. 418, 425 (1979). Due process is an admittedly flexible mechanism that calls for varying procedural protections depending upon the nature of the private interest at stake and the government function involved. *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972). In the numerous cases, this Court has attempted to delineate the scope of the procedural protections that the Due Process Clause of the Fourteenth Amendment requires. E.g. *Malloy v. Hogan,* 378 U.S. 1 (1964); *In re Gault,* 387 U.S. 1 (1967); *Duncan v. Louisana,* 391 U.S. 145 (1968); *Goldberg v. Kelly,* 397 U.S. 254 (1970); *In re Winship,* 397 U.S. 358

(1970); *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971); *Morrissey v. Brewer, supra,* 408 U.S.; *Gagnon v. Scarpelli,* 411 U.S. 778 (1973); *Mathews v. Eldridge,* 424 U.S. 319 (1976); *Addington v. Texas, supra,* 441 U.S.; *Lassiter v. Department of Social Services,* 452 U.S. 18 (1981); *Minnesota v. Murphy,* ____ U.S. ____, 104 S. Ct. 1136 (1984). A reading of these cases lead to the following conclusions:

1- Whether or not a particular procedural guarantee within the Bill of Rights applies to a particular proceeding depends upon the following: a- The nature and function of such right and to what extent the governmental action implicates the functions of such right; b- the extent of the loss an individual suffers as a result of governmental action, and; c- how the imposition of the procedural right affects the nature and consequences of the proceeding in question;

2- The loss of physical liberty that an individual suffers because of governmental action requires far greater procedural protection than instances in which governmental action implicates any other liberty or property interest;

3- The consequences of a criminal conviction are most severe which require the greatest application of the procedural protection of the Bill of Rights. However, the consequences flowing from both a juvenile delinquency proceeding and a civil commitment hearing are almost as severe and hence, require some, but not all of the procedures within the Bill of Rights. This brief will detail these propositions and establish that the Due Process Clause of the Fourteenth Amendment requires the application of the privilege against self-incrimination to the adjudicatory stage of a civil commitment hearing.

A. Just What Due Process Mandates in a Particular Situation Requires this Court to Examine the Purpose of the Procedural Protection in Question and Its Affect Upon the Proceeding in Question.

The Supreme Court has generally employed a standard of "fundamental fairness", *McKeiver v. Pennsylvania, supra,* 403 U.S. at 543 when determining the requirements of the Due Process Clause, particularly when the proceeding in question threatens an individual's liberty. See also, *Lassiter v. Department of Social Services, supra,* U.S. 452 at 60 (*Stevens,* J. dissenting). Just what constitutes "fundamental fairness" depends in part upon how government action implicates the traditional values served by a particular procedural guarantee. For instance, in *Gault,* this Court examined the nature and function of the privilege against self-incrimination, 387 U.S. at 47, and the right to counsel, 387 U.S. at 36, and determined that the consequences of a delinquency proceeding—a loss of liberty and a delinquency finding—necessitated the imposition of the right to counsel and the privilege against self-incrimination. Similarly, this Court examined the rationale for the jury trial when determining whether or not the Due Process Clause mandates the use of jury trials upon request in criminal proceedings, *Duncan v. Louisiana, supra,* 391 U.S. at 155-157, and delinquency proceedings and determined that a delinquency proceeding did not implicate the values that a jury trial sought to preserve. *McKeiver v. Pennsylvania, supra,* 403 U.S. at 452 (*White,* J. concurring). In the same vein, a determination of the constitutionally required standard of proof in juvenile delinquency and civil commitment proceedings required an analysis of the function of the burden of proof. *In re Winship, supra,* 397 U.S. at 361-364; *Addington v. Texas, supra,* 441 U.S. at 427-428. See also *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S.

52, 55 (1964); *Pointer v. Texas,* 380 U.S. 400, 404-405 (1965), for discussion of the purposes of the privilege against self-incrimination and the right of confrontation respectively.

The impact of a particular procedural right will also affect a determination as to whether or not the Due Process Clause imposes such right in a particular setting. For instance, this Court recognized the difficulty in proving mental illness and dangerousness beyond a reasonable doubt when it concluded that a state must prove its case by clear and convicing evidence in a civil commitment proceeding. *Addington v. Texas, supra,* 441 U.S. at 429-430. The adverse impact of counsel upon the informal setting of a probation revocation proceeding dictated a conclusion that the right to counsel does not automatically attach at such hearings. *Gagnon v. Scarpelli, supra,* 411 U.S. at 787-788. This Court declined to impose the requirement of a jury trial upon delinquency proceedings, due in part to the unnecessary formalities such requirement would impose upon the juvenile justice system. *McKeiver v. Pennsylvania, supra,* 403 U.S. at 550-551. See also *Morrissey v. Brewer, supra,* 408 U.S. at 486-490.

Furthermore, when determining what due process requires, this Court has recognized that the potential deprivation that an individual may suffer is a factor to consider. *Mathews v. Eldridge, supra,* 424 U.S. at 341. The greater the loss, the more procedural protection required. This brief will establish that the loss of physical liberty that an individual suffers requires greater procedural protection than the loss of any other constitutionally protected interest with the exception of life. See *Lockett v. Ohio,* 438 U.S. 586, 604 (1978); *Woodson v. North Carolina,* 428 U.S. 280, 305 (1976).

B. A Loss of Physical Liberty Requires Greater Procedural Protection Than Any Other Constitutionally Protected Interest.

In *Lassiter v. Department of Social Services,* this Court concluded that the right to counsel presumptively attaches only when a litigant faces a loss of physical liberty. By so holding, this Court recognized explicitly that the loss of liberty requires greater procedural protection than any other constitutionally protected interest. *Lassiter* was a culmination of many due process cases in which the Court required counsel when one suffers a loss of physical liberty, e.g. *In re Gault, supra,* 387 U.S. at 34-42, while concluding that government action that does not result in a loss of an absolute liberty interest does not require counsel. *Morrissey v. Brewer, supra,* 408 U.S. at 480; *Gagnon v. Scarpelli, supra,* 411 U.S. at 781; *Scott v. Illinois,* 440 U.S. 367, 373-374 (1979). Similarly, this Court has recognized that no automatic right to counsel exists when one faces the loss of a property right. *Goldberg v. Kelly, supra,* 397 U.S. at 270. Conversely, the loss of liberty that a juvenile suffers as a result of delinquency proceedings mandates the imposition of the privilege against self-incrimination, 387 U.S. at 42-55, appropriate notice, 387 U.S. at 33-34, and the right to confront and cross-examine adverse witnesses, 387 U.S. at 57. As this Court recognized in *Gault,*

> A proceeding where the issue is whether the child will be found to be "delinquent" and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. 387 U.S. at 36.

The Due Process Clause mandates the imposition of other procedural guarantees when a litigant faces a loss of liberty. A defendant whom a Court finds satisfies the

criteria for confinement under a sexual offender statute must be provided with not only counsel, but notice and the right to cross-examine witnesses. *Specht v. Patterson,* 386 U.S. 605, 610-611 (1967). On the other hand, the privilege against self-incrimination does not protect a probationer facing a loss of a conditional liberty interest as a result of a probation revocation proceeding. *Minnesota v. Murphy, supra,* ____ U.S. at ____, 104 S. Ct. at 1147, n. 7, although the state must provide him with appropriate notice and a conditional right to confront and cross-examine witnesses. 411 U.S. at 786. In sum, an individual who faces a loss of an absolute liberty interest is entitled to greater procedural protection than any other litigant aggrieved by governmental action. See *Gagnon v. Scarpelli, supra,* 411 U.S. at 789, n. 12.

C. The Consequences Flowing From a Finding of Hospitalization under a State's Civil Commitment Law are Nearly as Severe as the Consequences of a Criminal Conviction.

The consequences of a criminal conviction are so severe that the Due Process Clause requires the imposition of procedural protections upon a criminal trial than might not be necessary in any other setting. *Addington v. Texas, supra,* 441 U.S. at 423. (Compare *Duncan v. Louisiana, supra,* right to jury trial in criminal proceedings with *McKeiver v. Pennsylvania, supra,* no right to jury trial in delinquency proceedings.) However, an individual found in need of involuntary hospitalization suffers the same consequences as he would if convicted criminally—the loss of liberty and the imposition of a stigma that result from society labeling him either "criminal" or "mentally ill" and "dangerous". *In re Winship, supra,* 397 U.S. at 363 (1970); *Addington v. Texas,* 441 U.S. at 425-426. Indeed, since both a civil committee, a delinquent and a prisoner

receive rehabilitative measures when confined, see *Addington v. Texas, id.* at 422, *McKeiver v. Pennsylvania, supra,* 403 U.S. at 552 (*White,* J. concurring); *Morrissey v. Brewer, supra,* 408 U.S. at 484; case law indicates that the major difference between a finding of criminal guilt and a determination of the need for involuntary hospitalization is the imposition of blameworthiness that society imposes upon a convicted defendant. *McKeiver v. Pennsylvania, supra,* 403 U.S. at 551-553 (*White,* J. concurring). (See also *Addington v. Texas, supra,* 441 U.S. at 428 in which this Court emphasizes the punitive nature of a criminal trial.) As such, the Due Process Clause imposes some, but not all, procedural requirements of a criminal trial upon a civil commitment proceeding.

As noted, decisions by this Court establish that the greater the consequences of a particular proceeding, the greater amount of procedural protections the Fourteenth Amendment requires. (See also *Woodby v. Immigration and Naturalization Service,* 385 U.S. 276, 286 (1966), burden of proof of clear and convincing evidence in deportation proceedings.) Thus, when determining whether or not the privilege against self-incrimination applies to the adjudicatory stage of a civil commitment hearing, this Court must recognize the severe consequences that result from a determination of the need for involuntary confinement. It must then evaluate the nature and function of the privilege against self-incrimination and to what extent the adjudicatory stage of a civil commitment proceeding will implicate the values underlying the privilege. This Court must also examine to what extent the invocation of the privilege will alter the nature of a civil commitment proceeding and impact adversely upon such hearing.

This Court in *Lassiter,* as did the Illinois Supreme Court in the present case, applied the criteria enunciated in

Mathews v. Eldridge, to determine just what due process requires. Reliance upon such criteria is incorrect. This Court has recognized that the function of the legal process is to "minimize the risk of erroneous decisions," *Addington v. Texas, supra*, 441 U.S. at 425 (1979) and a central concern of this court in *Mathews* was the reliability of existing procedures and the probable value of additional procedural safeguards. 424 U.S. at 343. However, the "privilege against self-incrimination is not an adjunct to the ascertainment of truth." *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966). Instead, the values underlying the privilege include, *inter alia*, the societal concern for individual privacy and a fair state-individual balance. *Murphy v. Waterfront Commission of New York Harbor, supra*, 378 U.S. at 55 (1964). Consequently, the application of the Mathews formula does not address the rationale for applying the privilege. The application of such formula could possibly result in the conclusion that the privilege does not enhance the reliability of the fact-finding process. On the other hand, an application of the criteria previously delineated will establish that the privilege against self-incrimination applies to the adjudicatory stage of a civil commitment proceeding.

D. Application of the Above Propositions Establish that Under the Due Process Clause of the Fourteenth Amendment the Privilege Against Self-Incrimination Attaches at the Adjudicatory State of a Civil Commitment Proceeding.

Much of the rationale for the use of the privilege in a criminal trial applies with equal force to a civil commitment proceeding. The policies underlying the privilege consist of, *inter alia*, a desire for an accusatorial system of justice; a desire for a fair state-individual balance by requiring the government to leave an individual undisturbed

until good cause is shown and further requiring the government shoulder the entire load with its contest with the individual, and; a respect for the inviolability of the human personality and the right of each person to a "private enclave." *Murphy v. Waterfront Commission, supra,* 378 U.S. at 55. A civil commitment proceeding implicates these values.

When a state attempts to civilly commit an individual it alleges that such person is mentally ill and dangerous, *Jones v. United States,* 463 U.S. 354, 368 (1983), to a degree that justifies involuntary confinement. Monahan & Wexler, *A Definite Maybe: Proof and Probability in Civil Commitment,* 2 L. and Human Behav., 37, 38 (1978). As is the case with a criminal trial, the state utilizes its power and resources to involuntary confine someone. Because of the loss of liberty and stigma that result from involuntary confinement, *amicus* perceives no reason why a civil commitment hearing should be any less accusatorial than a criminal trial. As this court noted in *In re Gault,* "(T)he availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." 387 U.S. at 49.* To the extent that the state subjects an individual to an examination to obtain in-

*That a state may provide a civil committee with treatment is irrelevant. To justify the imposition of fewer procedural safeguards on the grounds that the state provides a benefit or potential benefit is to adopt the *quid pro quo* theory for the lack of procedural safeguards, an approach that the Chief Justice soundly criticized in *O'Connor v. Donaldson,* 42 U.S. 563, 585-587 (1975) (*Burger,* C.J., concurring). Furthermore, like a civil committee, a prisoner receives rehabilitation while incarcerated. Ill. Ann. Stat. ch. 38 §1-2 (Smith-Hurd) *People v. Williams,* 288 N.E. 2d 636-637 (Ill. App. 1972); Minn. Stat. Ann. §609.01(1); N.J. Stat. Ann. §2C 1-2(2) (West.); N.Y. Penal Law §1.05(5) (McKinney); Tex. Penal Code Ann. tit. 1 §1.02(1)(b) (Vernon); See also *Morrissey v. Brewer, supra,* 408 U.S. at 480.

formation to determine whether or not such person satisfies the criteria for commitment, such examination is analogous to a custodial interrogation when the police question a suspect to determine potential guilt. By subjecting an individual to a compelled examination at the adjudicatory stage of a civil commitment hearing, the government alters the state-individual balance by requiring an individual to provide the state with material, in this case, verbal utterances, which the state can use to prove its case for hospitalization.* Furthermore, a forced psychiatric examination destroys an individual's "private enclave." Such examinaton seeks to uncover substantial portions of individual's personality, the "inviobility of which is fundamental to privacy. Note, *Miranda on the Couch: An Approach to Problem of Self-Incrimination, Right to Counsel and Miranda Warnings in Pre-Trial Psychiatric Examinations of Criminal Defendants,* 11 Columbia J.L. & Soc. Prob. 403, 421 (1975).

The privilege is also designed to ensure that any admissions are reliable expressions of the truth. *In re Gault, supra,* 387 U.S. at 47. However, when a court appoints a doctor to examine an individual, such individual may already be labeled mentally ill and one's predetermined ideas about such individual may preclude objective consideration. *Miranda on the Couch* at 423. Similarly, just as a custodial interrogation may result in unreliable admissions from a suspect the police believe is guilty, a psychiatric examination of an individual whose mental state has been called into question by a court may result in an unreliable diagnosis; one that is colored by the belief that this person must suffer from mental illness or he

*_Estelle v. Smith,_ 451 U.S. 454 (1983) establishes that statements by a patient in a psychiatric interview do not constitute nontestimonial evidence but rather evidence that is communicative in nature which the Fifth Amendment protects. 451 U.S. at 463-464.

would not be before the court in the first place. Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom,* 62 Calif. L. Rev. 693, 722 (1974).

While this Court has recognized that a civil commitment hearing cannot be equated with a criminal trial, *Addington v. Texas,* 441 U.S. at 428, both the similarities and differences between the two miliate toward the application of the privilege at the adjudicatory in the former proceeding. Like a criminal trial, a civil commitment hearing is a formal judicial proceeding in which counsel represents an individual facing a loss of liberty.* Consequently, just

*In forty-eight of fifty states civil commitment is a formal judicial proceeding in which a civil committee is entitled to the assistance of counsel. Ala. Code tit. 22 §§52-8, 52-4; Alaska Stat. §§47.30.725 (b), 47.30.725 (d); Ariz. Rev. Stat. §§36-535, 36-537, 36-528; Ark. Stat. Ann. §§59-1402, 59-1408; Cal. Welfare and Institutions Code §5276, (West); Colo. Rev. Stat. §§27-10-111, 27-10-107(5); Conn. Gen Stat. Ann. §§17-177, 17-178, Del. Code Health & Safety tit. 16 §§5007, 5008; Fla. Stat. Ann. §394.467; Ga. Code Ann. §§37-3-61, 37-3-62; Haw. Rev. Stat. §§334-60.5, 334-60.4; Idaho Code §§66-328, 66-329; Ill. Ann. Stat. ch 91 1/2 §§3-800, 3-805; Ind. Code Ann. §16-14-9.1-5 *et seq.* (Burns); Iowa Code Ann. 229.7 *et seq.* (West); Kan. Stat. §59-2913 *et seq.;* Ky. Rev. Stat. §§202A.051, 202A.071, 202A.121; La. Rev. Stat. §§28:55, 28:53 (West); Me. Rev. Stat. Public Institutions & Corrections tit. 34-B-§3864; Mass. Gen. Laws Ann. ch. 123 §1 *et seq.* (West); Mich. Comp. Laws Ann. §339.1452 *et seq.;* Minn. Stat. Ann. §§253B.08, 253B.03(a) (West); Miss. Code Ann. §§41-21-73, 41-21-67; Mo. Ann. Stat. §632.335; Mont. Code Ann. §53-21-121 *et seq.;* Neb. Rev. Stat. §§83-1133, 83-1135; Nev. Rev. Stat. §§433A.220, 433A.270; N.H. Rev. Stat. Ann. §§135-B:3, 135-B:5; N.J. Stat. Ann. §30.4-42, N.J. Ct. R. 4:74-7(e); N.M. Stat. Ann. §§43-1-11, 43-1-4; N.Y. Mental Hygiene Law §§9.31 *et seq.,* 29.09, Judiciary Law §35 (McKinney) 22 NYCRR Part 694; N.C. Gen. Stat. §§122C-268, 122C-270; N.D. Cent. Code §§25.03.1-19, 25-03.1-13; Ohio Rev. Code Ann. §§5122.15, 5122.15(4) (Page); Okla. Stat. Ann. Mental Health Law §§54.4, 54.4(6); Or. Rev. Stat. §§426.060 *et seq.,* 426.100; Pa. Stat. Ann. tit.

(Footnote continued on following page.)

as this Court concluded in *Santosky v. Kramer*, 455 U.S. 745 (1982), that at least in New York, a permanent neglect proceeding contains many indicia of a criminal trial, 455 U.S. at 761-762, this Court must also recognize that civil commitment proceedings contain many of the same attributes. These include, but are not limited to the representation of counsel, the introduction of facts and expert opinion that tend to prove or disprove the state's case, the cross-examination of witnesses and the conducting of hearings pursuant to judicial rules of evidence.

In the present case, the State of Illinois attempted to compel Allen to assist it in proving its case against him through compulsory examination by filing a sexually dangerous person petition. The State took such action at the same time it charged Allen with unlawful restraint and deviate sexual assault. The circuit court dismissed the charges for lack of probable cause. *People v. Allen*, 481 N.E. 2d 690, 692 (1985). It appears incongruous that a state can compel an individual to assist it in proving its case against him under the civil law although it cannot do so under the criminal law, particularly when the proceedings are extremely similar in nature. The results are the same in both instances—a loss of liberty and the imposition of stigma.

While the question of whether or not an individual satisfies the criteria for involuntary confinement contains

---

(Footnote continued.)
50 §7301 *et seq.* (Purdon); R.I. Gen. Laws §§40.1-5-8, 40.1-5-13 *et seq.*, S.C. Code §§44-17-510 *et seq.*; 44-17-530; Tenn. Code Ann. §§33-3-603, 33-3-608; Tex. Mental Health Law Code Ann. tit. 92 §5547-26 *et seq.*; Utah Code Ann. §64-7-36; Vt. Stat. Ann. tit. 18 §§7612, 7615, 7613; Va. Code §§37.1-67.1, 37.1-67.3; Wash. Rev. Code §§71.05.310, 71.05.300; W. Va. Code §27-5-4; Wis. Stat. Ann. §51.20 (West); Wyo. Stat. §25-10-110.

essentially medical questions, the ultimate decision made by a judge is a legal one. *State v. Krol,* 344 A. 2d 289, 302 (N.J. 1975); *Hatcher v. Wachtel,* 269 S.E. 2d 849, 852 (W. Va. 1980). See also *Vitek v. Jones,* 445 U.S. 480, 495 (1980). Thus, while some dispute exists as to whether or not the state must employ expert witnesses in civil commitment proceedings (Compare *Addington v. Texas,* "Whether the individual is mentally ill and dangerous to either himself or others and is in need of therapy turns on the meaning of the facts which must be interpreted by the expert psychiatrists and psychologists" 441 U.S. at 429 with *Jurek v. Texas,* 428 U.S. 262 (1976), dangerousness proved through lay testimony; *Mims v. United States,* 375 F. 2d 135 (5th Cir. 1967) and *Barkley v. United States,* 323 F. 2d 804 (D.C. Cir. 1963), prosecutors obtained convictions without expert testimony when defendants raised insanity defense). Indeed, the State of Illinois was not required to introduce expert testimony to commit Allen as long as it produced evidence of specific acts establishing dangerousness. *Haber v. People,* 398 N.E. 2d 121, 123 (Ill. App. 1979). However, even if this Court concludes that a civil commitment hearing requires expert testimony, the state can obtain such evidence even if an individual invokes the privilege at the adjudicatory stage of a civil commitment hearing. For instance, the state may present the necessary facts through lay testimony and can then produce the expert to interpret such facts. In other words, after the introduction of lay testimony, the state's attorney can utilize the hypothetical question. See McCormick, *Evidence* 2nd Ed. p. 31-36, *Barefoot v. Estelle,* 463 U.S. 880, 903 (1983). Similarly, a state can present the testimony of doctors who have examined the individual

other than at the adjudicatory stage of a civil commitment proceeding.*

The application of the privilege to the adjudicating stage of a delinquency proceeding is most pertinent to the present analysis. Like a civil committee, a delinquent suffers a loss of liberty from an adverse determination. However, unlike commitment proceedings, no stigma flows from a determination of delinquency. *McKeiver v. Pennsylvania, supra,* 403 U.S. at 551-553. Both the state's mental health and delinquency systems serve rehabilitative purposes. See *McKeiver v. Pennsylvania, supra,* 403 U.S. at 547, *Addington v. Texas, supra,* 441 U.S. at 429. Furthermore, unlike a delinquent, a civil committee faces the prospect of the forcible administration of "mind-altering" *Mills v. Rogers,* 457 U.S. 291, 293, n.1. (1982) antipsychotic medication. See e.g. *Project Release v. Prevost,* 722 F. 2d 960 (2nd Cir. 1983). This is particularly so when a psychiatrist perceives rightly or wrongly that an emergency exists. *Rennie v. Klein,* 720 F. 2d 266 (3rd Cir. 1983); *Rogers v. Commissioner of Department of Mental Health,* 458 N.E. 2d 308 (Mass. 1983); *In re K.K.B.,* 609 P. 2d 747 (Okl. 1980). Despite the rehabilitative nature of the delin-

Amicus does not assert that an individual may invoke the privilege to refuse to submit to examinations by an admitting doctor at a psychiatric hospital or a treating doctor at such facility. The privilege attaches to examinations conducted in connection with judicial hearings at which one's liberty is at stake.

However, a number of states, including Illinois, grant the privilege against self-incrimination to civil committees. See e.g. Ill. Ann. Stat. ch 91 1/2 §3-208; Alaska Stat. §47.30.740; Miss. Code Ann. 41-21-73(3); Ark. Stat. Ann. §59-1408 (a) (5); Mo. Ann. Stat. §632.335(4). It has been recognized that such privilege does not seriously interfere with the state's objectives of civil commitment: "Experience in the public and private sectors has shown that application of the privilege against self-incrimination does not seriously impair the State's ability to achieve the valid objectives of civil commitment." *Matter of Rizer,* 409 N.E. 2d 383, 386 (Ill. App. 1980).

quency proceedings, this Court found that the Due Process Clause compels the application of the privilege due to loss of liberty from which a delinquent suffers. *In re Gault,* 387 U.S. at 50.* Thus, if a juvenile delinquent who suffers less adverse consequences than a civil committee may assert the privilege, once this Court recognizes that a civil commitment hearing implicates the values that the privilege seeks to protect and the application will not impact severely upon the process itself, this Court must conclude that the privilege against self-incrimination attaches to the adjudicatory stage of a civil commitment hearing.

A number of lower courts have addressed the issue of whether or not the privilege attaches during a civil commitment proceeding. However, to the best of *amicus'* knowledge not one court has addressed the issue of whether or not the privilege attaches at the adjudicatory stage. Thus, the decisions of the lower courts do not constitute persuasive authority.

---

*That it was the Due Process Clause that mandated the imposition of the privilege to delinquency proceedings and not an interpretation by this Court that a delinquency proceeding was the equivalent of a criminal trial was made clear in *McKeiver v. Pennsylvania, supra,* in which this Court refused to apply the right to a jury trial to delinquency proceedings. As Justice White noted, "We have not, however, considered the juvenile case a criminal proceeding within the meaning of the Sixth Amendment and hence subject to all of the restrictions normally applicable in criminal cases." 403 U.S. at 551 (*White,* J. concurring). Thus, it is not a question of do the proceedings at hand satisfy the criteria enunciated by the Court in *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168-169 (1963), as some have suggested. See e.g. Note, *Developments in the Law: Civil Commitment of the Mentally Ill,* 87 Harv. L. Rev. 1190, 1303-1306 (1974). *Mendoza-Martinez* merely focuses on whether a particular penalty constitutes a criminal or civil sanction. No one can even suggest that a state can punish mental illness. *Robinson v. California,* 370 U.S. 660 (1962). Hence the question becomes, given the noncriminal nature of a commitment proceeding, does the Due Process Clause still require the application of the privilege against self-incrimination?

For example, the Court in *Tippett v. Maryland,* 436 F. 2d 1153 (4th Cir. 1971), *cert.* dismissed *sub nom. Murel v. Baltimore City Criminal Court,* 407 U.S. 355 (1972), concluded that the impositions of the privilege would interfere with the treatment the state seeks to provide when it commits. 436 F. 2d at 1158. See also *Project Release v. Prevost,* 551 F. Supp. 1298, 1308 (E.D. N.Y. 1982). However, at noted, application of the privilege at the adjudicatory stage will not interfere with the interaction between patient and his treating psychiatrist. The Court in *French v. Blackburn,* 428 F. Supp. 1351 (M.D. N.C. 1977) relied on Judge Sobeloff's rationale in *Tippett* that the application of the privilege would interfere with the state determining whether or not an individual satisfied the criteria for confinement. 428 F. Supp. at 1359. However, application of the privilege at the adjudicatory stage results in no such interference. Other cases cited by the Illinois Supreme Court in this matter merely concluded that because a commitment proceeding is civil, the privilege does not attach. However, this Court in *Gault* noted clearly that the civil-criminal label is irrelevant. 387 U.S. at 49-50. The court in *Moss v. State,* 539 S.W. 2d 936 (Tex. Civ. App. 1976) rationalized its refusal to apply the privilege during a commitment proceeding on the ground that psychiatric exams were not untrustworthy. However, in so holding, the Texas court ignored the other purposes of the privilege that an examinatin at the adjudicatory stage implicates.

One may argue that application of the privilege at the adjudicatory stage together with the claiming of the doctor-patient privilege will interfere with a court obtaining sufficient information to reach an educated verdict. Such argument lacks merit for a number of reasons. As noted, even if an individual asserted the privilege against

self-incrimination at the adjudicatory stage and the doctor-patient privilege to prevent his treating physician from testifying, a court could still rely on testimony from an admitting psychiatrist, testimony from a non-treating testifying psychiatrist who answered hypothetical questions and non-opinion lay evidence. Furthermore, to the extent the privilege against self-incrimination at the adjudicatory stage conflicts with the imposition of the doctor-patient privilege in the sense that application of both will unduly interfere with a judicial determination, *amicus* believes that the privilege against self-incrimination must attach at the expense of the doctor-patient privilege. As noted, psychiatric examinations at the adjudicatory stage implicate the values underlying the privilege. On the other hand, the purpose of the doctor-patient privilege is to foster a therapeutic doctor-patient relationship. See VIII. J. Wigmore, *Evidence* §2380a. However, furthering doctor-patient communication is hardly a weighty concern when the state involuntarily places an individual on such treatment regimen in the first place. Whether or not an involuntarily confined patient chooses to engage in a treating relationship with a psychiatrist hardly depends upon whether or not communication will remain in confidence. Of far greater concern to the patient is whether such communication will lead to release. Furthermore, the historical role the privilege against self-incrimination has played within this nation's legal system dictates that if a court believes application of both the self-incrimination and the doctor-patient privilege will unduly interfere with a civil commitment determination, the self-incrimination privilege must be upheld. As this Court has noted,

> The privilege against self-incrimination registers an important advance in the development of our

> liberty—one of the great landmarks in man's struggle to make himself civilized. *Murphy v. Waterfront Commission, supra,* 378 U.S. at 55 citing *Ullman v. United States,* 350 U.S. 422,426 (1956).

See also VIII J. Wigmore, *Evidence* §§2250-2252.

Courts that have applied the privilege against self-incrimination to civil commitment proceedings constitute more persuasive authority than courts who have not done so. The court in *Suzuki v. Quisenberry,* 411 F. Supp. 1113 (D. Haw. 1976), while not addressing the issue of the application of the privilege to the adjudicatory stage, recognized the tension between the loss of an individual's liberty and the need for the state to obtain information to make a decision whether or not to commit. Noting the inquisitorial nature of compelled psychiatric exams, 411 F. Supp. 1130-1132, the court concluded that if no evidence existed apart from that obtained during a compelled examination, there should be no commitment. In other words, the state had ample opportunity to obtain evidence to justify involuntary confinement other than through a compelled psychiatric examination. Similarly, while the Court in *Lessard v. Schmidt,* 349 F. Supp. 1078 (E.D. Wisc. 1972), vacated on other grounds 414 U.S. 473 (1974), reinstated and enforced 379 F. Supp. 1376 (E.D. Wisc. 1974), vacated on other grounds, 421 U.S. 957 (1975), reinstated 413 F. Supp. 1318 (E.D. Wisc. 1976), did not engage in the most extensive analysis, its reliance on *In re Gault* and its focus on the loss of liberty for which civil committees suffers to uphold the application of the privilege, is certainly more persuasive than the decisions relied upon by the Illinois Supreme Court.

Conclusion.

For the reasons given in this brief, this Court should conclude that the privilege against self-incrimination attaches at the adjudicatory stage of a civil commitment proceeding which permits an individual to refuse to submit to a psychiatric examination conducted pursuant to such a hearing.

Respectfully submitted,

FRANCIS M. SAVASTANO
Director
Mental Health Information Service

BY: William M. Brooks
WILLIAM M. BROOKS
Mental Health Information Service
Attorney